(1) Supreme Court, U.S.
FILED

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

GARY L. HOOPER,
PETITIONER

v.

CARGILL, INCORPORATED,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Has Plaintiff established a *prima facie* case under the Age Discrimination in Employment Act in a reduction in force where Plaintiff's job title and supervisory duties were assumed by a younger employee and the job title of Defendant's two production supervisors, Hooper (age 46) and Allen (age 54) was assumed by two younger lower paid supervisors, Tigg (age 34) and Patterson (age 30) with less qualifications, experience and seniority.

2. Has Plaintiff established a *prima facie* case under the Age Discrimination in Employment Act in a reduction in force where there is additional evidence showing a statistical disparity in favor of younger employees, a failure of Defendant to follow its own reduction in force policies, an attempt by Defendant later abandoned to charge Plaintiff with unsatisfactory performance and discriminatory supervisory statements.

3. Did the Sixth Circuit panel violate the standards for summary judgment and assume the jury's function by weighing the evidence, construing the evidence in favor of the Defendant and ignoring evidence in support of Plaintiff on the issue of Plaintiff's *prima facie* case.

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II. Certiorari should be granted because there is a split in the Circuits on whether additional evidence showing statistical disparity, failure by Defendant to follow its own termination policies in a reorganization, the discredited reason of unsatisfactory performance initially used by Defendant and discriminatory supervisory statements is sufficient to complete a *prima facie* case.

III. Certiorari should be granted because the decisions of the lower courts are in

conflict as to summary judgment standards established by *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

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OPINIONS BELOW

The decisions of the United States Court of Appeals for the Sixth Circuit and the United States District Court for the Middle District of Tennessee are set forth in the Appendix. Both decisions are unreported.

JURISIDCITION

The jurisdiction of this Court is involved pursuant to 28 U.S.C. §1254(1). The United States Court of Appeals for the Sixth Circuit issued its decision on July 23, 1999. Panel rehearing and rehearing *En banc* were timely requested. Rehearing was denied on September 23, 1999. This petition was timely filed within 90 days of the panel rehearing denial.

STATUTE INVOLVED

The statute construed is the Age Discrimination in Employment Act, 29 U.S.C. §623(a), which says: "It shall be unlawful for an employer – (1) . . . to discharge any individual or otherwise discriminate against an individual . . . because of such individual's age . . ."

STATEMENT OF THE CASE

The United States District Court granted Defendant's motion for summary judgment on the sole ground that Plaintiff

had not established a *prima facie* case. The issue of pretext was not reached or decided by the District Court. The United States Circuit Court for the Sixth Circuit affirmed the District Court's decision.

(FACTS)

Defendant had two production supervisors, one for each shift. Hooper (age 46) was the production supervisor in charge of the first shift and Allen (age 54) was the production supervisor in charge of the second shift. After the reorganization, Tigg (age 34) was the production supervisor for the first shift and Patterson (age 30) was the production supervisor for the second shift. Before the reorganization, Defendant had two production supervisor with an average age of 50, after the reorganization, Defendant had two production supervisors with the average age of 32. All the records show the title of the position before and after the reorganization to be production supervisor. Apx. 39-43.

Defendant compared five employees for the production supervisor position. Hooper (age 46), Allen (age 54), Tigg (age 34), Patterson (age 30) and Brewer (age 40). Defendant retained the two youngest as production supervisors. The two oldest

were terminated.[1] The third oldest, Brewer, was put in the position previously held by Patterson. In addition, the average age for salaried employees was 39.8. The average age for the four separated salaried employees (Hooper, Allen, Hood and Burkett) was 45.[2] Apx. 42-56, 80, 81.

Hooper supervised approximately 40 employees. The supervision of all those employees was assumed by Tigg.[3] Hooper was an excellent employee who worked as a production supervisor for approximately 14 years. Eight of those years he was a supervisor over the entire production including shipping and receiving. Both Tigg and Patterson had worked under his direct supervision. Tigg had worked as an hourly employee and

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[1] Allen was removed from his production supervisor position which was given to Patterson. Since he would be eligible for early retirement in January of 1997, he was permitted to remain on at his same salary as a production worker. He received his salary until around February 1, 1997. Thereafter, he accepted the demotion to a production position at an hourly wage rate. Apx. 57, 58.

[2] The panel excluded Allen from the average on the theory that he was retained in an hourly production position, however, the Supreme Court has stated that a "discharge, demotion, or undesirable reassignment" constitutes an adverse tangible employment action. *Burlington Industries, Inc. v. Ellerth,* 118 S.Ct. 2257, 2270 (1998).

[3] Some of Hooper's administrative duties were transferred to other employees. The vast majority of Hooper's duties were assumed by Tigg. Defendants agreed at oral argument that all of the supervisory duties previously held by Hooper in relation to the 40 employees were assumed by Tigg. Apx. 67, 42-44, 26.

John Patterson was trained by Hooper. Apx. 67, 42-44, 26, 73-78.

Before the reorganization, Tigg had been recently promoted to the position of production coordinator. In that position, he only supervised seven employees in the shipping and receiving department. Prior to that promotion, Tigg had never supervised employees nor had any management duty. Before he was promoted to production coordinator, Tigg's duties consisted of writing up orders in the scheduling department. When Tigg took over the production supervisor position, he retained his supervision of the seven employees in the shipping and receiving department. Apx. 42, 43, 75-78, 62, 63.

The Defendant had a detailed policy for selecting employees for termination in a reduction in force. This policy is reflected in the reduction in force memo of June 13, 1996 which stated in part as follows:

> The Cargill Grid Process was used to determine the persons to be severed (see attached). Our objective in applying the Grid Process was to have the best performers with the highest potential remaining following the reduction. Consequently, employees whose positions were being eliminate were being compared to other employees who occupied permanent positions. The grids were completed by the Nashville location manager with the most

knowledge of the employee's job performance. Apx. 80, 81.

The grids used in the process contained specific criteria requiring detailed analyses and ranking in twelve separate areas. After the individual ratings were multiplied by the weight, the evaluator had to determine the total points. The terminations were to be based on this ranking. The records show that Defendant had selected Plaintiff and Allen for termination well before May 30, 1996 when the rankings were prepared. Apx. 37, 44-56.

Despite the fact that Pittard signed both the 1994 evaluation of Plaintiff Hooper which rated Hooper from good to very good in numerous areas and the May 31, 1996 evaluation trashing the Plaintiff's job performance, the plant manager, Bob Pittard, cannot recall any major changes in Plaintiff Hooper's job knowledge between 1993 and the May 31, 1996 evaluation. Nor can he recall any major changes in Plaintiff Hooper's productivity level between 1993 and the May 30, 1996 evaluation, nor can he recall any specific facts to justify his conclusion that Mr. Hooper's effort had changed from 1993 through 1996, nor can he recall the specifics of how his self-motivation may have changed from 1993 to 1996. Pittard did

not recall any changes in Mr. Hooper's ability with regard to problem solving and decision making which occurred from 1993 to 1996, nor can he recall any changes with regard to his teamwork from 1993 to 1996, nor can he recall any change in Plaintiff Hooper's ability to supervise the other employees from 1993 to 1996. Apx. 82-92.

Pittard gave Hooper his rating for attendance based only on his personal knowledge, despite the fact he could not answer how often Hooper was late during this period, no records were kept of Hooper being late and he cannot recall the year anyone may have spoken with Hooper about being late. Pittard cannot recall what facts he had to justify giving Hooper a "2" with regard to quality of work. Pittard cannot recall why Hooper was given a "2" with regard to problem solving. Pittard cannot recall why Hooper was given a "2" with regard to versatility. Nor can he recall why Hooper was given a "2" with regard to promotability. Pittard cannot recall why Hooper was given a "3" with regard to supervisory ability. When asked why Hooper was given a "3" with regard to productivity, could only state that it was "just my judgment". Apx. 82-92.

After Defendant made the decision to terminate Plaintiff Defendant gave Plaintiff on 5/31/96 the worst evaluation he had ever received. His supervisor, Drake, who prepared the affidavit told him that he was only doing what he was told to do.[4] On the very same day, Drake also gave Allen a substandard evaluation. Apx. 73-75.

Plaintiff was not aware of any new performance standards and there is no record indicating that higher standards were ever instituted. Indeed Tigg's evaluation for six months before the new standards were alleged to have gone into effect and six months after were verbatim, clearly indicating there had been no change in standards. Apx. 73-78, 9, 10.

Defendant has now withdrawn its claim Hooper had been terminated for performance reasons. Further Defendant has now conceded that Plaintiff was in the protected age group at the time the events contested occurred, that he had the proper qualifications for the job he lost and that he suffered an adverse employment action. In subsequent depositions, both Pittard and Drake confirmed Hooper was well qualified. In the memo dated

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[4] Drake also told Hooper his big salary was the reason for his termination. Plaintiff was by far the highest paid production supervisor at $50,500. Apx. 74, 80, 81.

6/13/96, Defendant pointed out that "[o]ne potential problem that must be pointed out is that historically, both Gary Hooper and Carl Allen have experienced Good to Very Good performance reviews." Apx. 32, 80, 81, 93, 97, 96, 94.

REASONS FOR GRANTING PETITION

I. CERTIORARI SHOULD BE GRANTED BECAUSE THERE IS A SPLIT IN THE CIRCUITS AS TO WHETHER IN A REDUCTION IN FORCE IN ESTABLISHING A *PRIMA FACIE* CASE THE TERMINATED EMPLOYEE SHOULD BE COMPARED WITH YOUNGER RETAINED EMPLOYEES TO DETERMINE IF THEY WERE FAVORED ON THE BASIS OF AGE.

The Sixth Circuit held that in a reduction in force proceeding unless the terminated employee is actually replaced by a retained younger employee Plaintiff is unable to establish a *prima facie* case by showing his duties were assumed by younger, less qualified employees. This decision is directly contrary to the Seventh Circuit decision in *Miller v. Borden, Inc.*, 168 F.3d 308 (7th Cir. 1999),the Second Circuit's decision in *Cronin v. Aetna Life Ins. Co.*, 46 F.3d 196 (2nd Cir. 1995) and the First Circuit's decision in *Brennen v. GTE Government Systems Corp.*, 150 F.3d 21 (1st Cir. 1998).

Miller involved only a single employee; however, it was just as much a reduction in force or reorganization as this case. His duties were absorbed by other younger employees. *Miller, supra*, 168 F.3d at 313 stated as follows:

> An important exception, however, arises when an employer, in the course of restructuring the business, terminates an employee and does not *replace* the terminated employee, but arranges affairs so that the "responsibilities [of the terminated employee are] absorbed by other employees." . . . This court has explained that "the inference of discrimination [in such cases] is premised on some degree of fungibility between the [terminated employee's] job and the younger employee's job." . . . In the "fungibility" type of situation, all the employee needs to establish is that he was *treated less favorably* than one or more similarly situated younger employees. *Id.; Maier v. Lucent Technologies, Inc.*, 120 F.3d 730, 735 (7th Cir. 1997). Thus, an employer who discharges a protected employee and either hires or *retains* younger employees to "fill positions for which the older employee was qualified" bears the burden of explaining its actions. *Oxman v. WLS-TV*, 846 F.2d 448, 455-456 (7th Cir. 1988).

The burden of establishing a *prima facie* case "is not onerous." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1094, 67 L.Ed. 2.d. 207 (1981). Because of the difficulty of proving discrimination, victims are permitted wide leeway in meeting the initial stage of a *prima*

facie case. *Hayden v. First National Bank*, 595 F.2d 994 (5th Cir. 1979).

The very purpose of the *McDonnell-Douglas-Burdine* burden shifting approach is to permit victims of employment discrimination to prove their case by inferential and circumstantial evidence. *Kline v. Tennessee Valley Authority*, 128 F.3d. 337, 348 (6th Cir. 1997). A Plaintiff may establish a *prima facie* case by showing he was treated differently from the younger "less qualified supervisors selected over him." *Cronin v. Aetna Life Ins. Co.*, 463 F.3d. 196 (2nd Cir. 1995).

II. CERTIORARI SHOULD BE GRANTED BECAUSE THERE IS A SPLIT IN THE CIRCUITS ON WHETHER ADDITIONAL EVIDENCE SHOWING STATISTICAL DISPARITY, FAILURE BY DEFENDANT TO FOLLOW ITS OWN TERMINATION POLICIES IN A REORGANIZATION, THE DISCREDITED REASON OF UNSATISFACTORY PERFORMANCE INITIALLY USED BY DEFENDANT AND DISCRIMINATORY SUPERVISORY STATEMENTS IS SUFFICIENT TO COMPLETE A *PRIMA FACIE* CASE.

Defendant's failure to follow its own policies permits an inference of age discrimination. *Gallo v. Prudential Residential Service's, Ltd.*, 22 F.3d. 1219, 1227 (2nd Cir. 1994). In a case remarkably similar, the first circuit held that where the

employer did not complete the Work Force Analysis Forms, such deviation from established policy could be evidence of discrimination. *Brennan v. GTE Government Systems Corp.*, 150 F.3d. 21, 29 (1st Cir. 1998).

An inference of discrimination can also be drawn from the employers earlier attempt to base the termination on unsatisfactory performance. Submission by the employer of a discredited reason is itself evidence of discriminatory motive. *Brooks v. Monroe Systems for Business, Inc.*, 873 F.2d. 202, 204 (8th Cir.) *cert. denied* 493 U.S. 853, 110 S.Ct. 154, 107 L.Ed.2d. 112 (1989). Statistics can be considered along with the other evidence for purposes of a *prima facie* case. *EEOC v New York Times Broadcasting Services*, 542 F.2d. 356, 360 (6th Cir. 1976 – sample of 5 employees). *See also Luciano v. Olsten Corp.*, 110 F.3d. 210 (2nd Cir. 1997).

Bocklehurst v. PPG Industries, Inc., 123 F.3d. 890 (6th Cir. 1997) is clearly distinguishable. In that case, the retained employee was clearly more qualified than the terminated employee. *Bocklehurst* also indicated that the Plaintiff must show more than pretext and also show that illegal age discrimination played a role. Thus, *Bocklehurst* adopted the

pretext plus standard rejected by the Supreme Court in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2472, 128 L.Ed. 2d 407 (1993) and by the Sixth Circuit in *Kline v. Tennessee Valley Authority*, 128 F.3d. 337, 341 (6th Cir. 1997).

The panel's construction of *Barnes v. GenCorp, Inc.*, 896 F.2d 1457 (6th Cir. 1990) case and its emphasis on the lack of linking evidence showing discrimination shows the panel, like *Bocklehurst*, used the pretext plus standard rejected by *Hicks* and *Kline*. This standard effectively destroys the ability of a Plaintiff to establish his case through indirect evidence. The panel's position is contrary to cases on similar facts in other circuits. *Miller v. Borden, Inc.*, 168 F.3d. 308 (7th Cir. 1999); *Brennen v. GTE Government Systems Corp*, 150 F.3d 21 (1st Cir. 1998); *Bray v. Marriott Hotels*, 110 F.3d. 986, 990 (3rd Cir. 1997); *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d. 326 (3rd. Cir. 1995); *Gallo v. Prudential Residential, Serv's, Ltd.*, 22 F.3d 1219, 1223, 1224 (2nd Cir. 1994).

III. CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISIONS OF THE LOWER COURTS ARE IN CONFLICT AS TO SUMMARY JUDGMENT STANDARDS ESTABLISHED BY *ANDERSON V. LIBERTY LOBBY, INC.*, 477 U.S. 242, 106 S.CT. 2505, 2511, 91 L.ED.2D 202 (1986).

Any of the above factors would be sufficient to meet Plaintiff's light burden of proof at the *prima facie* stage. Here the district court resolved the factual and credibility issues against plaintiff. On a motion for summary judgment the function of the court is to identify disputed issues, not to resolve them. *Sutera v. Schering Corp.*, 73 F.3d 13, 15, 16 (2nd Cir. 1995); *Maddow v. Proctor & Gamble Co., Inc.*, 107 F.3d 846, 851 (11th Cir. 1997); *Cronin v. Aetna Life Ins. Co., supra* 46 F.3d at 203; *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 36 (2nd Cir. 1994). It is respectfully submitted that a reasonable juror could find discriminatory intent on the facts presented. *Williams v. Vitro Services Corp.*, 144 F.3d 1438, 1443 (11th Cir. 1998); *McCorstin v. U.S. Steel Corp.*, 621 F.2d 749 (5th Cir. 1980). *See also Hayden v. First National Bank*, 595 F.2d 994 (5th Cir. 1979).

It is respectfully submitted that the District Court and the panel assumed the jury's function by weighing the evidence and construing the evidence in favor of Defendant and ignoring evidence in support of Plaintiff on the issue of Plaintiff's *prima facie* case. This violates the standards established by *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2511, 91

L.Ed.2d 202 (1986); *see also Hayden v. First National Bank*, 595 F.2d 994 (5th Cir. 1979).

CONCLUSION

This case presents important questions of the burden of Plaintiff to establish a *prima facie* case and the role of the jury in employment discrimination matters. Review by this Court is warranted because of the conflicts between the Sixth Circuit and other Circuits.

Respectfully submitted,

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No. 98-5870

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GARY L. HOOPER,

Plaintiff-Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

CARGILL, INCORPORATED,

Defendant-Appellee.

Before: **BOGGS, NORRIS, and BATCHELDER,** Circuit Judges.

PER CURIAM. After Cargill, Inc. discharged Gary Hooper in a reduction in force, Hooper alleged age discrimination in violation of Tennessee and federal law. Hooper appeals from the district court's grant of summary judgment to Cargill, Inc. We affirm.

I

Born on November 1, 1949, Gary Lee Hooper began working for Mitchell Steel, Inc. in Nashville in 1972. In 1983, Cargill, Inc. ("Cargill") acquired Mitchell Steel's Nashville plant. Beginning (at the latest) in 1986, Hooper worked as a "Production Supervisor" for one of the three production shifts. Hooper consistently received performance evaluations of "good" and "very good." The Nashville plant's March 1996 loss of its largest customer forced the plant's General Manager to restructure and restaff the plant. As a result, in June 1996 Cargill fired Hooper (along with seven other employees) in a reduction in force.

ON August 26, 1996, Hooper filed a complaint with the Tennessee Human Rights Commission and with the EEOC, alleging age discrimination. On June 17, 1997, Hooper filed a complaint in federal court alleging age discrimination in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§621-634, and the Tennessee Human Rights Act, Tenn. Code Ann. §§4-21-101 & 4-21-401 & 4-21-407 (1998). On June 12, 1998, the court granted Cargill's motion for summary judgment, and dismissed the case. It found that Hooper did not state a prima facie case of age discrimination

and that "there is absolutely no evidence linking the termination to Plaintiff's age."

II

Hooper argues on appeal that the district court erred by finding that he failed to satisfy the prima facie burdens of an ADEA age discrimination claim. First, he believes that "a reasonable juror could easily conclude that Hooper was replaced by [Robert] Tigg," a younger employee. Second, Hooper contends that, even if Tigg did not replace him, the record supports an inference that Cargill fired Hooper because of his age. Courts analyze claims under the Tennessee Human Rights Act under the same standards as federal discrimination law, *see, e.g., Bruce v. Western Auto Supply Co.*, 669 S.W.2d 95, 97 (Tenn. Ct. App. 1984), so we refer only to the ADEA claim.

A. Whether Cargill Replaced Hooper

A plaintiff may state a prima facie case of age discrimination by showing that (1) he belongs to the protected class; (2) he had the qualifications to perform the job; (3) he suffered an adverse employment action; and (4) his employer replaced him with a younger employee. *See, e.g., Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1081 (6th Cir.

1994). In a workforce reduction, however, a plaintiff faces a more significant burden. If his employer did not replace him, the plaintiff cannot state a prima facie case without presenting "evidence sufficiently probative to allow a factfinder to believe that the employer intentionally discriminated against the plaintiff because of age." *Barner v. GenCorp, Inc.*, 896 F.2d 1457, 1466 (6th Cir.), *cert. denied*, 498 U.S. 878 (1990). "The mere termination of a competent employee when a employer is making cutbacks due to economic insufficiency is insufficient to establish a prima facie case of age discrimination." *LaGrant v. Gulf & Western Mfg. Co.*, 748 F.2d 1087, 1090 (6th Cir. 1984). "The plaintiff in such reorganization cases must come forward with additional direct, circumstantial, or statistical evidence that age was a factor in his termination in order to establish a prima facie case." *Id.* at 1091. Cargill concedes that Hooper satisfied the first three elements of the prima facie test, but it contends (and the district court agreed) that it did not replace Hooper with a younger employee.

Hooper argues that Robert Tigg, then 34 years old, replaced him, and that he thus stated a prima facie case even if he did not present evidence suggesting that Cargill intentionally

discriminated. In our opinion in *Barnes*, we discussed the meaning of "replaced":

> [A] person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work. A person is replaced only when another employee is hired or reassigned to perform the plaintiff's duties.

Barnes, 896 F.2d at 1465. The evidence shows that there is no dispute as to the material fact that Tigg did not replace Hooper, rather, Bob Pittard, the Plant Manager, placed Tigg in a new position that combined Tigg's old duties and many of Hooper's old duties. The "Statement of Undisputed Facts in Support of Cargill's Motion for Summary Judgement" contains four undisputed paragraphs that prove that Tigg did not replace Hooper.

> 56. Following the plan realignment and reduction in force, Tigg did not replace Hooper. Tigg continues to perform his former duties supervising the shipping and scheduling departments and also supervised [sic] the first shift production employees formerly supervised by Hooper.
>
> RESPONSE. Admitted only for purposes of this motion. . . . .
>
> 59. After the reduction in force, Tigg began performing Hooper's former supervisory duties **in addition to his own** and that Hooper's remaining duties were distributed among other

> existing employees who remained after the reduction in force.
>
> RESPONSE: Admitted only for purposes of this motion. However, Plaintiff would state that it was his understanding that Robert Tigg assumed the majority of his job duties.
>
> 60. Tigg did not receive a pay raise at the time he took over these additional duties.
>
> RESPONSE: Admitted only for purposes of this motion.
>
> 61. Hooper also formerly performed certain administrative duties (purchasing of plant supplies, handling employee records and time cards) that Tigg did not pick up and that are now being performed by other employees who were employed prior to the reduction in force. These employees perform these duties in addition to their own duties.
>
> RESPONSE: Admitted only for purposes of this motion.

(emphasis in original)(citations to record omitted).

Hooper argues on appeal that Tigg replaced him, but he does not address the admissions reprinted above. He seems to use "replacement" in its formal sense, rather than conforming his usage to the definition in the *Barnes* opinion. For example, he argues that, "In this case plaintiff agrees there was no replacement in the sense of new employees being hired, however there was a direct replacement of older employees by substantially younger, less qualified employees in the production supervisor position." True, where Gary Hooper (46) and Carl

Allen (54) once supervised production shifts, now Robert Tigg (34) and John Patterson (30) supervise production shifts. Applying the *Barnes* interpretation of "replace," however, shows that Tigg did not replace Hooper: Tigg shouldered some of Hooper's duties (production supervisor) in addition to Tigg's duties (shipping and scheduling supervisor); Cargill distributed Hooper's remaining duties among existing employees performing related work. As for Hooper" assertion that "[t]he same job title was retained with only a minor change in duties," Hooper produces no evidence to support his statement, and the evidence in the record belies his claim.[1]

B. Whether the Evidence Permits an Inference of Age Discrimination

"The plaintiff in [cases of corporate reorganization or of a reduction in force] must come forward with . . . direct, circumstantial, or statistical evidence that age was a factor in his

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[1] Suggesting the existence of a prima facie burden more lax than the one we describe above, Hooper cites many cases from other circuits. For example, he filed as supplemental authority the opinion in *Miller v. Borden, Inc.*, 168 F.3d 308 (7th Cir. 1999), and he claimed that the *Miller* opinion established burdens less onerous than those required of Hooper by the district court. Even if this court's opinion in *Barnes* did not control, we would not apply the reasoning in *Miller* to this appeal: *Miller* considers the burdens attending a case of a single discharge, not a reduction in force, and the opinion

termination in order to establish a prima facie case." *LaGrant*, 748 F.2d at 1091. Hooper contends that the record supports the inference that Cargill fired him because of his age. Although Hooper offers some evidence to substantiate his claim, he fails to "eliminate[] the most common non-discriminatory explanations" for his firing. *Allen v. Diebold, Inc.*, 33 F.3d 674, 678 (6th Cir. 1994). Little evidence suggests that Cargill considered Hooper's age, and Hooper certainly did not "present evidence of actions taken by the employer which, if unexplained, are more likely than not based on consideration of impermissible factors." *Ibid.* Hooper admits that Cargill suffered economic problems and had to fire someone, he just wishes that Cargill had not fired him:

> Questions: Who did you think should have gone – or do you think somebody else should have gone rather than you?
>
> Hooper: I think somebody else should have gone rather than me.
>
> Questions: Anybody in specific, or just somebody other than you?
>
> Hooper: Just somebody other than me, sir.

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distinguishes reduction-in-force from single-discharge cases. *See Miller*, 168 F.3d at 313 & n.1.

Questions: Okay. But not anybody in particular?

Hooper: No, sir.

(J.A. 100-01).

Hooper presents a variety of arguments to contend that he stated a prima facie case of age discrimination. Hooper's reasons fall loosely into several categories:

1. Termination of a Qualified Employee, and the Relative Qualifications of Hooper & Tigg.

Hooper emphasizes his annual performance evaluations, contending that the review portray him as exceptionally qualified. As this court noted in *Brocklehurst v. PPG Industries, Inc.*, 123 F.3d 890 (6th Cir. 1997), however, "the decision to discharge [in a reduction in force] a qualified, older employee is not inherently suspicious . . . In a RIF, qualified employees are going to be discharged." *Id.* at 896. Further, Hooper cannot deny that his May 1996 evaluation suggested that his "overall current performance" "needs improvement," nor can he deny that, in May 1995, the new General Manager, Frank Gettys, asked managers to raise their expectations, and that Cargill's national Human Resources director agreed with Gettys. Instead, Hooper argues that Gettys did not provide managers with

explicit standards. He also correctly observes that Tigg's July 1994 and October 1995 evaluations (both by Pittard) are almost identical to each other (implying that the performance standards were not raised for Tigg).

Tigg's high 1995 rankings, assigned six months before Gettys asked Pittard to prepare for a reduction in force, suggest that Tigg performed well, not that Pittard intended to sabotage Hooper's career, and Hooper offers no evidence to the contrary. After Gettys' arrival, other employees (in addition to Hooper) received ratings lower than those they had previously received. Hooper makes the remarkable, unevidenced claim that "all of the objective records, including evaluations and past performance history, show that Hooper was an exceptional employee who clearly was more qualified than the younger employee who replaced him." Hooper's "subjective determination that he was better qualified."" *LaGrant*, 748 F.2d at 1091, does not satisfy the burdens of prima facie case of age discrimination. Pittard believed that Tigg would perform better in the consolidated position than would Hooper; although the evidence could support a contrary conclusion (*e.g.*, Hooper had far more

supervisory experience than did Tigg), the record shows that Pittard could reasonably consider Tigg more qualified.[2]

2. Hooper's Seniority, Drake's Comment About Hooper's Salary, & "Statistics"

The documents in the joint appendix contain no direct evidence of age discrimination. Hooper believes that an inference of discrimination arises from his seniority, his relatively high salary, and from Russell Drake's alleged comment that Cargill fired Hooper because he "earned too much."[3] Hooper admits that Cargill does not have a seniority system regarding salaried employees that required it first to fire the least-senior employees. He also agrees that he did not receive raises merely because of his age. Thus, even if Cargill targeted Hooper because of his seniority and salary, it did not violate the

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[2] An internal memo sent within Cargill's national Human Resources Department states that Hooper's previous laudatory performance reviews represented a "potential problem," although the memo explains that increased performance expectations resulted in Hooper's lower 1996 evaluation. The memo does not permit the inference of age discrimination, however: merely because the company realized that an enterprising attorney might attempt to use the performance reviews as evidence does not, without more, render either the reviews of the evaluation of potential legal problems probative of discriminatory intent.

[3] Drake, the Production Manager, served as Hooper's immediate supervisor. Cargill observes that Drake testified that Gettys and Pittard did not discuss Hooper's salary with Drake – strong evidence that, if Drake made the

ADEA: "Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily 'age based.'" *Hazer Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993); *see also Allen v. Diebold, Inc.*, 33 F.3d 674, 677 (6th Cir. 1994)("[P]plaintiffs must allege that Diebold discriminated against them because they were old, not because they were expensive.").

Hooper also refers to "statistics" to prove his case: "Here the average age of defendant's two production supervisors [Hooper and Allen] before the reorganization was 50 and after the reorganization was 32 [Tigg and Patterson]. When the comparison is to all salaried employees, before the reorganization the average age was 39.8 and the average age for the four salaried employees terminated was 45."

Hooper's first statement misleads. Cargill reconfigured the jobs, so Tigg and Patterson do not hold the same jobs – they merely assume some of the duties. Hooper cannot prove age discrimination merely by showing that Cargill retained younger

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comment to Hooper, Drake relied on his subjective judgment, and not on the expressed judgment of Cargill's decisionmakers.

employees in jobs that Hooper could have performed. *See, e.g., Barnes*, 896 F.2d at 1465. Further, Cargill did not fire Allen (then 54). Instead, it permitted him to stay on salary until he reached age 55 and qualified for early retirement; even after reaching 55, he continued to work as an hourly employee (and, as of December 1997, he still worked at Cargill). Additionally, if Pittard could reasonably find Tigg superior to Hooper, Cargill's alleged discrimination against Allen would not bolster Hooper's age discrimination claim. *See, e.g., Barnes*, 896 F.2d at 1475.

As for Hooper's second statement (concerning average age), the extremely small sample size reduces the probativeness of the averages. *See, e.g., Brocklehurst*, 123 F.3d at 897 (questioning the strength of discrimination claims based on small samples of employees); *Black v. City of Akron*, 831 F.2d 131, 134 (6th Cir. 1987). Cargill fired eight employees in the reduction in force, and appears to have fired only three salaried employees, as it permitted Allen to stay: Maria Burkett (then 36), Durenda Hood (then 45) and Hooper (then 46) – resulting in an average age of 42.33, not 45, for the terminated salaried employees. Further, Burkett, Hood, Hooper, and Allen appears

to have held low ranking salaried positions, which suggests that Cargill released them because they did not hold vital positions, and not because of their age.

3. Cargill's Approach to the RIF: Pittard's Rankings and Refusal to Permit Transfer

Pittard bore responsibility for much of the planning of the reduction in force: he wrote a May 13, 1996 draft proposal reorganizing the plant's management structure and suggesting that Cargill fire six salaried employees, including Hooper; he prepared the May 30 or 31, 1996 evaluations of five employees to decide who would fill the position eventually assigned to Tigg; he presided over Drake" May 31, 1996 performance review of Hooper; and he spoke with Hooper when he fired him. Hooper complains about the chronology of the first three events, pointing out that, as of May 13, Pittard found him dispensable. Although Pittard could not remember many of the factors that influenced him when he compared the five employees in late May, Hooper has not shown that Pittard sought to justify his May 13 recommendations by doctoring the comparisons or by pressuring Drake to give a negative review. As Gettys commented, "You don't go in the day of a RIF and throw

something to the wall and see if it sticks. You have to start planning . . ." Even if we infer that Pittard made a decision in May 13 and later acted to justify the decision, the inference does not suggest that Pittard targeted Hooper because of his age.

A dispute persists regarding Pittard's failure to offer Hooper the ability to transfer to another plant. In his deposition, Hooper testified that, "When I went to Mr. Pittard's office on June 27th to get terminated, I asked him at that point was there any option for transfer, and he told me no." In his affidavit, Hooper declares that Pittard did not offer a transfer and that, had Pittard offered, Hooper would have accepted. On appeal, Hooper states without citation that Cargill "had a *policy* of transferring employees if they were caught in a reduction in force" (emphasis added).

Cargill does not appear to have a policy of transferring employees, however. Pittard testified that, in 1986, the Nashville plant implemented a reduction in force and that, to his knowledge, Cargill did not offer transfers. When questioned about the 1996 reduction in force, Pittard testified that Dave Lewis, Cargill's national Human Resources manger, told him that transfers "would not be an option." Although the joint

appendix contains only portions of Lewis' deposition, the joint appendix reprints segments in which he suggests that Cargill "would try to accommodate" employees if they wished to transfer, "an opening was available and also the employee possessed the technical skills and competencies to in essence fill the vacancy, yes, that would be considered." He testified that he did not remember if anyone in the Nashville plant asked him about transferring the fired employees, and that he did not remember if he "approached the issue of transferring."

Hooper presents no evidence that Cargill gave any fired Nashville employee the option to transfer. Lewis' comments suggest that Cargill permits transfers only when convenient, and not as policy, and Pittard testified that Lewis told him that transfers "would not be an option." Especially in the absence of a company policy permitting or encouraging transfers in case of a reduction in force, Cargill's behavior does not support an inference of discrimination. "This Circuit has clearly established that an employer has no duty under ADEA to permit an employee to transfer to another position or to displace workers with less seniority when the employee's position is eliminated as part of a work force reduction." *Barnes*, 896 F.2d at 1469.

III

Hooper presents no substantial arguments that the district court did not address in its opinion. Faced with pressing financial difficulties, Cargill had to fire someone; although Hooper understandably wishes that Cargill had fired someone else, he does not show that Cargill chose to fire him because of his age. For the reasons given above, the judgment of the district court is AFFIRMED.

FILED SEP 23, 1999
LEONARD GREEN, CLERK

No. 98-5870

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GARY L. HOOPER,

Plaintiff-Appellant,

CARGILL, INCORPORATED,

Defendant-Appellee.

BEFORE: BOGGS, NORRIS, and BATCHELDER, Circuit Judges.

The court having received a petition for hearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested to vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The pan has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully

considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s Leonard Green
Leonard Green, Clerk

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

GARY L. HOOPER	}	
	}	
v.	}	No. 3:97-0650
	}	Judge Nixon
CARGILL, INC.	}	

MEMORANDUM

Pending before the Court in the above-styled matter is Defendant's Motion for Summary Judgment (Doc. No. 15), to which Plaintiff has responded in opposition (Doc. No. 19), and Defendant has replied. (Doc. No. 24). For the reasons stated below, the Court grants the Motion.

I. BACKGROUND

Plaintiff filed his age discrimination action on June 17, 1997, under the Age Discrimination in Employment Act, 29 U.S.C. §§621, et seq. ("ADEA"), and the Tennessee Human Rights Act, Tenn. Code Ann. §§4-21-101, et seq. ("THRA"). Defendant moved for summary judgment after discovery was completed.

Defendant, Cargill, Inc., appointed Frank Gettys as General Manager of its Nashville plant in may 1995, to either increase the plant's productivity or shut it down. (Pl.'s Resp. ¶¶

3-4). Gettys felts that the inventory was too high, over 80,000 tons at the time compared to 35,000 tons today, and he felt that the plant was over staffed. (Id. ¶¶5, 7.) To begin to correct these problems, Gettys eliminated the third shift. (Id. ¶7.) As other employees left the plant over the next ten months, they were not replaced. (Id. ¶8.) Gettys also told the managers to raise their expectation levels for evaluations, which would result in lower evaluations for most employees. (Def.'s Mem. at 3-4.) Plaintiff purports to deny this; however, in actuality he admits that Gettys told the managers to raise their expectations but denies that the managers actually did so. (Pl.'s Resp. ¶¶11-19). Other cost-reduction measures taken include eliminating the guard service, reducing the facility's working capital, and reducing short term interest. (Id. ¶22).

Defendant received notice in March 1996, that it would lose its largest customer at the end of June, resulting in a loss of twenty percent (20%) of its business. (Id. ¶¶23, 62.) Due to this and other losses, Defendant decided to reduce staff to match the decrease production demands. (Id. ¶¶26, 63.) Bob Pittard, the plant manger, began reviewing the operation for a workforce reduction. (Id. ¶28.) Pittard decided to eliminated some

positions and combine others, resulting in the termination of some employees. (Id. ¶32.) As a result, Plaintiff's position was combined with another. (Id.) Pittard was to determine who he thought should be eliminated based upon his personnel knowledge, business judgment, and experience with the employees. (Def.'s Mem. at 8.) Pittard determined that Plaintiff was not the employee best suited to perform the duties of the new position, which combined his duties with that of another supervisor. (Pittard Dep. at 106.)

Pittard compared Plaintiff to Robert Tigg, Carl Allen, John Patterson, and James Brewer in determining who to let go in the reduction. (Id. at 84.) Pittard was to use the following criteria in his determinations: (1) whether the individual can perform the new job responsibilities; (2) MBO/employee evaluations; (3) grid system; (4) personal knowledge; and, (5) relative abilities and qualifications of other employees considering the remaining work, responsibilities and duties. (Def." Ans. No. 19) Defendant does not have a seniority system for salaried employees that would apply in a workforce reduction. (Pl.' s Resp. ¶53.) Neither does Defendant have an automatic policy of transferring employees to other plants during

a reduction. (Id. ¶¶54, 72.) Pittard filled out rating forms for Plaintiff, Tigg and Patterson on May 30, 1996, and for Allen on May 31, 1996. (Pl.'s Ex. 7.) The form for Brewer has not been made a part of the record. (Def.'s Reply at 4, n.1.) The ratings and ages of each of the employees compared are as follows:

NAME	AGE	SCORE
Gary Hooper	46	70
Carl Allen	54	78
John Patterson	27	108
Robert Tigg	34	117

(Pl.'s Ex. 7; Pl.'s Mem. at 5.)

Throughout the course of Plaintiff's employment with Defendant, Plaintiff had received annual evaluations which rated him from "good" to "very good." (Pl.'s Ex. 3.) In May 1996, Plaintiff was shown an organizational charge by another employee that showed that Plaintiff was "not [be] needed" after the reduction. (Pl.'s Ex. 1.) On May 31, 1996, after Plaintiff had seen the chart and after Pittard had ranked the employees, Pittard gave Plaintiff the lowest performance review of his career, the first with ratings below "good." (Pl.'s Ex. 3.)

Prior to this ranking, all of the employees had received "good" to "very good" evaluations. (Pl.'s Mem. at 6-7.) After this ranking, Plaintiff received a lower evaluation, Allen received a lower evaluation, and Patterson received a higher evaluation. (Id. at 7.) Tigg was not evaluated in this time period but in October 1995, he had received a "very good" evaluation, the same rating he had received before the higher standards were implemented. (Pl.'s Ex. 4.)

As a part of the workforce reduction, eight employees were terminated in June 1996. (Def.'s Ans. No. 2.) Of these, three were under forty years of age and five were over forty years of age. (Id.) Eighteen employees older than Plaintiff were retained after the reduction. (Id. at No. 1.) Allen was selected for the reduction in force, but due to the fact that he lacked only six months being eligible for early retirement, Defendant offered to retain him until he met the eligibility requirements. (Pl.'s Resp. ¶¶49-50). Allen declined at first and accepted a position with another

company, but he later applied for and received an hourly position with Defendant and declined the other job. (Id. ¶51).

Plaintiff had been the production supervisor for approximately fourteen (14) to fifteen (15) years before he was terminated. (Def.'s Mem. at 8.) From 1983, to 1991, Plaintiff had supervised the production department, the shipping and receiving department, and the scheduling department. (Id.) In 1991, Defendant divided these responsibilities into separate positions. (Id.) At another time, Plaintiff had served as safety coordinator for the plant. (Id.) After 1991, as production supervisor, Plaintiff supervised thirty to forty employees. (Id.) Tigg became supervisor of the shipping and receiving department and the scheduling department in March 1996, and was responsible for approximately seven employees. (Id. at 9.)

On June 27, 1996, Plaintiff was terminated from his employment as plant production supervisor by Defendant after having been employed for over twenty-four years and

having reached the age of forty-six. (Pl.'s Aff. ¶¶1, 15, 18.) Plaintiff received gross severance and vacation pay of over $28,000.00. (Pl.'s Resp. ¶55.) Tigg took over most of Plaintiff's duties as production supervisor in addition to his own duties as shipping and receiving supervisor and scheduling supervisor. (Id. ¶59.) The remainder of Plaintiff's duties were assigned to other employees to perform in addition to their own duties. (Id.)

II. LEGAL STANDARDS

Under Fed. R. Civ. P. 56(c), summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In order to grant summary judgment, the Court must determine that a reasonable jury would be unable to return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The moving party bears the initial burden of proof

that no genuine issues of material fact are present. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Moreover, the facts and reasonable inferences to be drawn therefrom must be viewed in the light most favorable to the non-movant. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

To defeat a motion for summary judgment, the opposing party must come forward with "more than just some metaphysical doubt as to the material fact." Street v. J. C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989). Where the record in its entirety would not lead a jury to find for the non-movant, a genuine issue of material fact does not exist. Id. at 1478. Material facts are those which, under the substantive law governing the issue, might affect the outcome of the suit. Andeson, 477 U.S. at 247-48. Mere allegations of a factual dispute are not sufficient to meet this standard. Id.

The ADEA prohibits discrimination in the terms and conditions of employment on the basis of an

individual's age,[1] and the THRA imports the ADEA's protections.[2] To state a claim under the ADEA, a plaintiff must provide direct evidence of discrimination (although such "smoking gun" evidence is rarely available), indirect evidence, or circumstantial evidence. Woythal v. Tex-Tenn. Corp., 112 F.3d 243, 246 (6th Cir. 1997)(quoting Gagne v. Northwestern Nat'l Ins. Co., 881 F.2d 309, 314-15 (6th Cir. 1989)(citation omitted)). If a plaintiff lacks direct evidence, a jury may still infer discriminatory intent under the framework adopted in the context of Title VII litigation. See

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[1] The statute states, in relevant part:

> It shall be unlawful for an employer . . . to fail to refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . .

29 U.S.C. §§62 et seq. The statute applies to individuals between the ages of forty and seventy years. Id. at §631(a).

[2] The statute specifically provides: "[I]t is the purpose and intent of the General Assembly by this enactment to provide for execution within Tennessee of the policies embodied in the Federal Civil Rights Acts of 1964, 1968 and 1972 and the Age Discrimination in Employment Act of 1967, as amended. . ." Tenn. Code Ann. §4-21-101. Claims under the Tennessee law are analyzed according to the same standards as those under the ADEA. Trentham v. K-Mart Corp., 806 F.Supp. 692 (E.D. Tenn. 1991), aff'd, 952 F.2d 403 (6th Cir. 1992).

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); see also O'Conner v. Consolidated Coin Caterers Corp., 517 US. 308, 311 (1996)(assuming McDonnell Douglas framework is applicable to ADEA suits).

According to this approach, a plaintiff may state a *prima facie* case of age discrimination by presenting evidence that: (1) he or she is a member of the protected class; (2) he or she is qualified to do the job; (3) despite these qualifications, he or she suffered an adverse employment action; and (4) his or her position was filled by a younger employee. Manzer v. Diamond Shamrock Chems. Co., 29 F.3d 1078, 1081 (6th Cir. 1994). However, in a workforce reduction, where the employee is not replaced, the plaintiff's burden to prove a *prima facie* case is heavier. Barnes v. Gencorp. Inc., 896 F.2d 1457, 1464-65 (6th Cir. 1990); LaGrant v. Gulf & W. Mfg. Co., 748 F.2d 1087, 1091 (6th Cir. 1984). While there is no longer a requirement of replacement under this standard, the fourth factor is modified to require the production of direct, circumstantial or statistical evidence tending to indicate that the employer acted on the basis of the employee's age. Barnes, 896 F.2d at 1466; LaGrant, 748 F.2d at 1091. Plaintiff does not dispute that Defendant was

undergoing a workforce reduction. (Hooper Dep. at 73-74, 144, 257-58; Pl.'s Resp. ¶¶4-10, 21-28, 31, 33, 38, 45-46, 62-64). Plaintiff also admits that he was not replaced by Tigg, but rather that Tigg took over some of Plaintiff's duties in addition to his own. (Pl.'s Resp. ¶56.)

Although other circuits word the test in different ways or use a slightly different test, the Sixth Circuit has clearly adopted the above-stated standard, most recently, in Brocklehurst v. PPG Indus., Inc., 123 F.2d 890, 896 (6th Cir. 1997). Plaintiff cited to O' Conner, supra, for the proposition that the fourth factor should be that "the process of selection produced a residual work force of persons in the group containing some unprotected persons who were performing at a level lower than that at which he was performing." (Pl.'s Mem. at 13.) However, this Supreme Court case does not stand for that proposition; rather, the Court held that the fourth factor should not be restricted to cases in which the employee is replaced by someone *outside of the protected class*, but should include any case where the employee is replaced by someone substantially younger. O'Conner, 517 U.S. at 313.

Likewise, the Sixth Circuit cases cited by Plaintiff, Kline v. Tennessee Valley Auth., 128 F.3d 337 (6th Cir. 1997); Gibson v. Accuride Corp., 124 F.3d 197 (6th Cir. 1997) and Howard v. City of Southfield, 97 F.3d 1452 (6th Cir. 1996), also have no effect on this standard. These cases do not apply to workforce reductions. See Kline, 128 F.3d 337; Gibson, 124 F.3d 197; Howard, 97 F.3d 1452. Therefore, the standard for proving a *prima facie* case in a workforce reduction is still the Barnes standard.

Once these four elements are proven, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for its actions. Woythal, 112 F.3d at 246 (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981)). If the defendant carries this burden, the plaintiff must then produce "sufficient evidence to allow a jury to reasonably reject [the employer's] explanation" as a pretext for discrimination. Id. The Supreme Court in St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 518 (1993), made clear that "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Moreover, the Court held that "[i]t is

not enough . . . to *dis*believe the employer; the fact finder must *believe* the plaintiff's explanation of intentional discrimination." Id. at 519.

III. DISCUSSION

Defendant concedes that Plaintiff has established the first three elements of the *prima facie* burden, given that he was over forty and under seventy years of age at the time the events contested occurred; he had the proper qualifications for the job he lost; and, he suffered an adverse employment action. (Def.'s Mem. at 20.) However, Defendant disputes that Plaintiff has satisfied the fourth element, a showing which requires that Defendant singled out Plaintiff based on his age. (Id.)

Summary judgment is appropriate for the simple reason that there is absolutely no evidence linking the termination to Plaintiff's age. See Ackerman v. Diamond Shamrock Corp., 670 F.2d 66, 70 (6th Cir. 1982)(holding that the ultimate question is whether the decision was made based on the employee's age). Defendant does not dispute that Plaintiff was qualified for his position (Def.'s Reply at 12); however, it was under no obligation to retain Plaintiff, who had senior status, instead of a younger employee when Defendant reasonably believed that the

younger employee was better qualified. See Wilson v. Firestone Tire & Rubber Co., 932 F.2d 510, 517 (6th Cir. 1991); Barnes, 896 F.2d at 1471.

Plaintiff has not alleged or offered evidence that Tigg was not qualified for the new position or did not merit his good evaluations. Plaintiff has not offered evidence that he did not deserve his lower evaluation under the higher expectations of the new management. Plaintiff admits that Defendant terminated workers under forty and retained workers over forty. (Hooper Dep. at 91-92, 141, 179; Pl.'s Resp. ¶45-48.) The Employee Rating Forms used to determine who would be let go do not include the ages of the employees or any indication that age was used in the ratings. (Pl.'s Ex. 7.) Plaintiff's subjective belief that he was better qualified than Tigg or that the decision was age-based is not evidence of discrimination. See LaGrant, 748 F.2d at 1091. Also, the fact that Plaintiff had more experience than Tigg does not show that he was better qualified. See id. at 1090.

Although business judgments in regard to a discharge are not open to inquiry, an employer must show that its decision that one employee is less qualified than another was reasonable.

See Barnes, 896 F.2d at 1471. This does not mean that the Court must necessarily agree with the employer's decision or that the employer must prove the absence of a discriminatory motive, but merely that the decision has a basis in fact. See id.; Chappell v. GTE Prods. Corp., 803 F.2d 261, 266 (6th Cir. 1986). Defendant has offered support to show that its decision was reasonable. Pittard testified that Plaintiff's lower rating was due in part to Defendant's higher expectations under new management. (Pittard Dep. at 58.) Also, he did not see the same level of self-motivation in the form of extra hours and effort put in by Plaintiff that he saw in other supervisors and he felt that the computer requirements of the new job presented an issue for Plaintiff. (Id. at 58, 97.) In addition, Pittard provided supporting comments for each score on the Employee Rating Form. (Plaintiff's Ex. 7.)

Plaintiff has not come forward with any other proof or factual allegations to show that Defendant terminated his employment due to his age. Plaintiff alleges that the statement that he was terminated due to his high salary correlates with his age because his high salary was due to his length of service, which is in turn linked to his age. (Pl." Mem. at 22.) Moreover,

Plaintiff asserts that this is direct evidence of discrimination. (Id.) However, the Supreme Court has held that decisions based on factors that relate to years of service, such as pension status, which *can* be correlated with age but that are not necessarily age-based, do not constitute a violation of the ADEA absent additional evidence linking the decision to a consideration of age. See Hazen Paper Co. v. Biggins, 507 U.S. 604, 611-12 (1993). Significantly, Plaintiff admits that his salary increases were not received "just because [he] was another year older." (Hooper Dep. at 165.) An employee's salary, like pension status, is analytically distinct from his age since a younger employee could just as well receive a higher salary than an older employee. See Hazen, 507 U.S. at 611. A decision to terminate an employee based on his salary alone, therefore, is not a violation of the ADEA. See id. The ADEA was enacted to protect against inaccurate stereotypes about age, not accurate judgments about an employee's salary. See id. at 612.

Plaintiff makes no other allegations of age-based statements made by Defendant. (Pl.'s Resp. ¶67; Hooper Dep. at 162-63, 165, 172, 264.) The only document presented by the Plaintiff that contained the employee's ages was the one sent to

the Human Resources Director as required on June 13, 1996, after the termination decision was made. (Pl.'s Resp. ¶68; Pl.'s Ex. 13.) Also, the facts that personnel information with Plaintiff's age was available to Defendant and that Defendant might have known Plaintiff's age are not sufficient to show that age was considered in the decision. See Wilson, 932 F.2d at 514.

Plaintiff next claims that Defendant's refusal to transfer him to another location is evidence of discrimination. (Pl.'s Mem. at 22.) Although Defendant did not have an automatic transfer policy, it did allow transfers. (Lewis Dep. at 25.) However, there is no duty on employers to transfer employees with more seniority in a workforce reduction. See Barnes, 896 F.2d at 1469. Plaintiff admits that he has no evidence that any other employees were transferred by Defendant in a workforce reduction. (Pl.'s Resp. ¶73.)

Similarly, Plaintiff's claim that the realignment plan he was shown by another employee is evidence of discrimination is not supported by law. There was no indication of the employees' ages on the document and Plaintiff admitted that planning for a reduction is a good idea. (Hooper Dep. at 145-

46). Plaintiff offers no legal or factual reason that this document is evidence of age discrimination.

None of Plaintiff's allegations, taken alone or as a whole, establish an inference that Defendant singled out Plaintiff based on his age. Because Plaintiff has not established a *prima facie* case, there is no need to determine if the Defendant has articulated a legitimate reason for its decision or if the Plaintiff can show that such a reason is pretextual.

IV. CONCLUSION

For the reasons set forth above, the Court finds that no genuine issues of material fact exist in this case. Therefore, the Court GRANTS Defendant's Motion for Summary Judgment. This action renders Defendant's Motion to Dismiss Plaintiff's Claim for Punitive Damages moot. An Order consistent with the foregoing reasoning will be entered contemporaneously with this Memorandum.

Entered this the 12th day of June, 1998.

/s John T. Nixon
JOHN T. NIXON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

GARY L. HOOPER,	}	
	}	
v.	}	No. 3:97-0650
	}	Judge Nixon
CARGILL, INC.	}	

ORDER

The Court is in receipt of Defendant's Motion for Summary Judgment in the above-styled matter to which Plaintiff has responded in opposition.

Consistent with the contemporaneously filed Memorandum, the Court hereby GRANTS Defendant's Motion for Summary Judgment and DISMISSES this action with prejudice.

Entered this the 12th day of June, 1998.

/s John T. Nixon
JOHN T. NIXON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

MEMORANDUM

To: Frank Gettys

From: Bob Pittard

Date: May 20, 1996

Subject: Plant Realignment

Employee	Position	Reason
Russell Drake	Quality Assurance Manager	
Denny Randall	Plant Engineer	
Robert Tigg	Production Supv 1st	
Gary Hooper		Performance
Carl Allen		Performance
John Patterson	Production Supv 2nd	
Tony Burkhart	Setup	
Mike Campbell	Setup	
Tina Knott	Scheduling	
Jim Crane	Shipping Coord	
Arthur Esqueta	Quality System Coord	
Jason McCoy		Job Elimination
James Brewer	Safety/Purch/Personnel	
Durenda Hood		Job Elimination
John Downing		Performance

Pittard
Exhibit No. 17
10-8-97

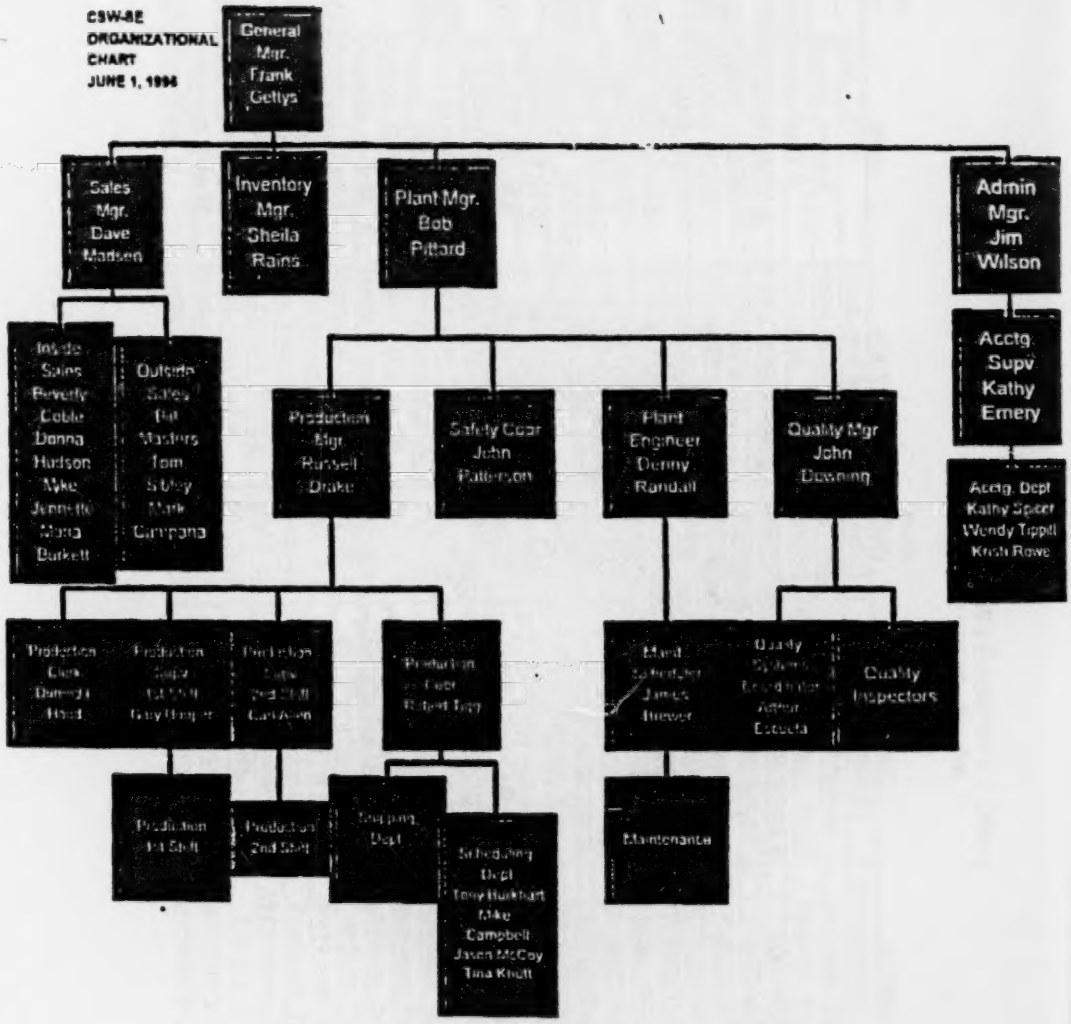
CSW Nashville Employees -- Office
As of 1-31-96 - Present

Date of Hire	Date Left	Name	Job Title	Birth Date	Address 1	Address 2	Phone #	Reason For Leaving
02/06/82		Allen, Carl B	Production Supvr B	01/05/42	1003 Creek Glen Ct.	Hendersonville, Tn 37075	615/822-0377	
04/09/87		Brewer, James L	Maint Scheduler	12/11/55	6991 Browns Mill Road	Lascassas, TN 37085	615/904-2021	
03/01/93	07/01/96	Brown, Roger R	MT Analyst	06/17/63	3205 Harbor Lane N. 84106	Plymouth, Mn 55447	612/559-8808	Relocation/Mlps
01/04/88	07/01/96	Burkett, Marie A	Inside Sales Rep B	08/03/60	3235 Anderson Road	Antioch Tn, 37013	615/399-0818	Job Reduction
07/01/83		Burkhart, Anthony M	Prod Scheduler	11/28/63	1396 Anderson Lane	Joelton, Tn 37080	615/746-8942	
09/17/87	03/25/97	Campana, Mark D	Sales Rep	06/21/58	1643 Birchwood Circle	Franklin, Tn 37064	615/794-4299	Another Job
05/04/87		Campbell, Michael S	Prod Scheduler	10/13/64	6100 Popular Grove Road	Mcewen, Tn 37101	615/582-8900	
08/01/88		Coble, Beverly J	Sr Inside Sls Rep	09/26/47	1016 Nighthawk Lane	Mt. Juliet, Tn 37122	615/754-4636	
10/19/87	01/29/96	Coco, Rita V	Invty Cntl Clk V	09/08/38	6447 Old Hickory Blvd	Whitesecreek, TN 37189	615/876-7638	Personal Reason
12/16/91		Crane, James P	Shipping Coord VI	04/22/59	108 Travis Lane	Lavergne, Tn 37086	615/793-6058	
01/06/86	06/26/96	Downing, John A III	Tech Service/QC	04/27/59	Unknown	Brooklyn Park, Mn	unknown	Another Job
07/01/83		Drake, William R	Production Mgr.	04/24/52	2004 Hunters Lane	Mt. Juliet, Tn 37122	615/758-7452	
09/06/88		Emery, Kathy M	Accounting Supv.	11/19/65	1605 Berrywood Way	Nashville, Tn 37207	615/860-5821	
01/29/90		Escueta, Arthur V	Sched Clerk III	09/13/66	21 Vaughns Gap F99	Nashville, Tn 37205	615/356-6262	
09/01/77		Gettys, Robert F	General Manager	07/25/51	412 Forrest Park Circle	Franklin, Tn 37064	615/591-2213	
07/01/83	07/01/96	Hood, Durenda M	Plant Clerk V	07/16/50	108 Orchard Valley Circle	Hendersonville, Tn 37075	615/822-7661	Job Reduction
07/01/83	07/01/96	Hooper, Gary L	Production Supvr A	11/01/49	4121 Hutson Ave	Nashville, Tn 37216	615/228-8341	Job Reduction
10/10/85		Hudson, Donna L	Inside Sales Rep B	09/02/58	1253 White Road	Bon Aqua, Tn 37025	615/412-4522	
07/11/90		Jennette, Jerry M	Inside Sales Rep B	04/01/68	1433 Turkey Creek Road	Dickson, Tn 37055	615/441-4178	
12/16/89	07/31/96	Kingsbury, Clara V	Billing Clk IV	04/16/34	306 Shepherd Hills Dr	Madison, Tn 37115	615/859-4684	Retired
05/26/90		Knott, Kellina K	Prod Scheduler	10/09/51	206 Laurel Hill Dr	Old Hickory, Tn 37138	615/847-6315	
09/02/75		Madsen, David E	Gen. Sales Mgr.	06/03/49	5563 Heathside Lane	Brentwood, Tn 37027	615/377-8240	
01/05/87		Masters, William H	Sr. Outside Sls Rep	06/17/43	2230 North Woods Drive	Murfreesboro, Tn 37130	615/893-4681	
04/09/84	02/26/96	Otto, Michael D	Production Coord	11/27/62	1625 Callie Way DR	Franklin, Tn 37064	615/591-2982	Another Job
04/30/90		Patterson, John W	Production Supvr C	10/09/65	130 Franklin Heights Dr	Murfreesboro, Tn 37129	615/895-2900	
05/30/94	04/16/96	Pifer, Diana M	Accts Pay Clerk V	09/24/53	1281 Goshentown Road	Hendersonville, TN 37075	615/828-0796	Personal Reasons

A-40

CSW Nashville Employees -- Office
As of 1-31-96 - Present

Date of Hire	Date Left	Name	Job Title	Birth Date	Address 1	Address 2	Phone #	Reason For Leaving
04/27/81		Pittard, Robert W	Plant Manager A	07/31/53	1104 Fair Meadow Ct	Mt. Juliet, Tn 37122	615/758-8383	
11/20/84	05/23/97	Rains, Sheila K	Inside Sales Mgr C	12/25/51	1204 Clarks St	Old Hickory, Tn 37138	615/847-1197	Personal Reasons
07/18/94		Randall, John D	Plant Engineer	05/01/48	909 Lincoya Bay Dr	Nashville, Tn 37214	615/391-3197	
06/01/81	03/19/96	Schoener, Richard G	Sales Rep	03/19/57	8073 Eagleridge Dr	WestChester, OH 45069	513/385-4915	Another Job
03/01/84		Sibley, Thomas A	Sr Outside Sales Rep	10/13/47	4011 Breakwater Dr	Chattanooga, Tn 37343	423/843-9349	
07/19/93		Spicer, Kathy M	Invty Cntl Clk IV	12/25/73	7940 Daughterty Copley Rd	Primm Springs, Tn 38476	615/799-0667	
06/06/94	04/15/96	Starnes, Patrick T	Sales/Purch Asst V	12/20/63	607 Neill Ave	Nashville, Tn 37206	615/226-4435	Another Job
01/30/84		Tigg, Robert D	Prod Scheduler	09/30/61	4005 Windwood Lane	Nashville, Tn 37214	615/885-0728	
03/20/95	04/01/96	Tinsley, Steven	Outside Sales Trainee	04/06/68	6929 Lydia Lane J204	Hammond, IN 46323	219/844-1714	Relocated/E. Chicago, IN
03/09/92	06/19/97	Tippit, Wendy	Accountant V	06/28/59	510 Heritage Dr Apt. 58	Madison, Tn 37115	615/860-2114	Moved to NJ
01/11/82		Wilson, James M	Admin Manager B	02/14/59	1336 Timber Valley Dr	Nashville, Tn 37214	615/872-6078	



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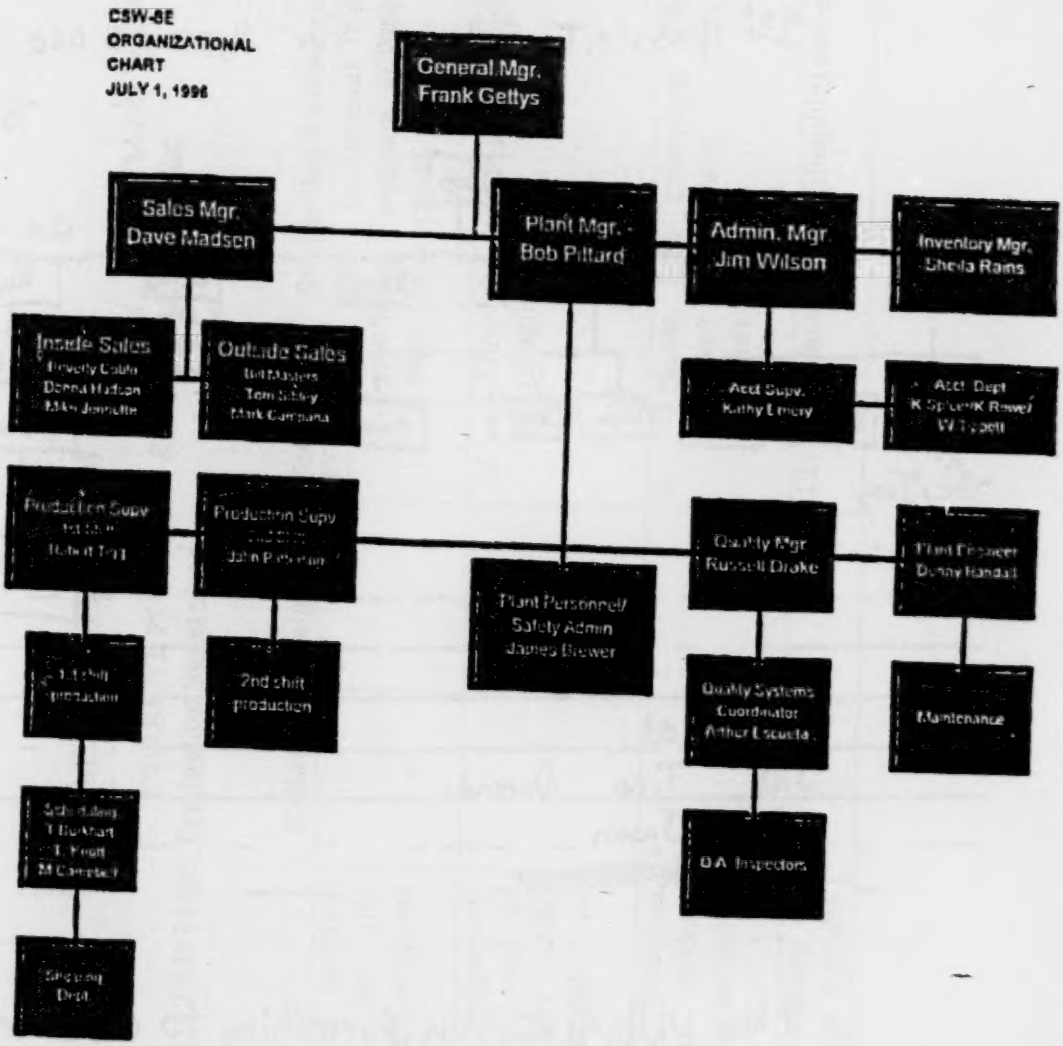
CSW-8E
ORGANIZATIONAL
CHART
JULY 1, 1998
General Mgr.
Frank Gettys
Sales Mgr.
Dave Madsen
Plant Mgr.
Bob Pittard
Admin. Mgr.
Jim Wilson
Inventory Mgr.
Sheila Rains
Inside Sales
Beverly Cobb
Donna Hudson
Mike Jennette
Outside Sales
Bill Masters
Tom Sibley
Mark Campana
Acct Supv.
Kathy Emery
Acct Dept
K Spicer/K Rowe/
W Tippett
Production Supv
1st Shift
Robert Tutt
Production Supv
2nd Shift
John Peterson
Plant Personnel/
Safety Admin
James Brewer
Quality Mgr
Russell Drake
Plant Engineer
Donny Randall
1st shift
production
2nd shift
production
Quality Systems
Coordinator
Arthur Escueta
Maintenance
QA Inspectors

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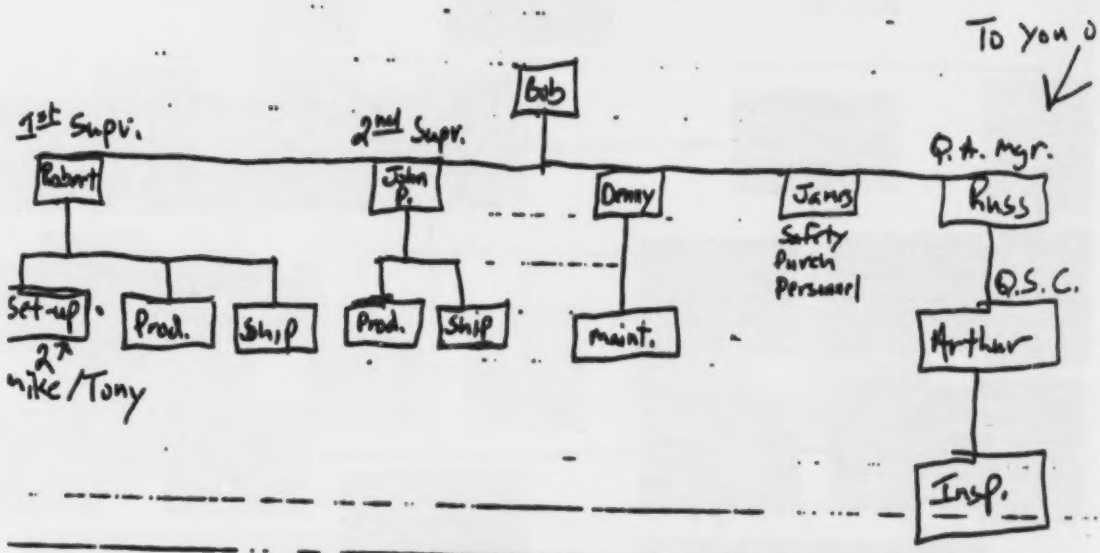
Frank, 5/13/

1st pass at Salaried for 11,000 / 3,000



Not needed:
J.D. Tina Durenda
Gary Jason
Carl ~~the taskmaster~~

This will give you something to consider and I will keep looking at also. Will also start on hourly.

Thanks,

Bob

BEST AVAILABLE COPY

EMPLOYEE RATING FORM

NAME: Robert Tigg **CURRENT POSITION:** Production Coordinator **GRAND TOTAL:** 117
POSITION BEING EVALUATED FOR: Production Supervisor

CRITERIA	Rating	x Weight	= Points	Supporting Comments
Job knowledge – Possesses technical knowledge required for the job. Understands non-technical areas of the job and related matters	4	3	12	Has plant background (illegible) scheduling, shipping (illegible) of these requirements
Productivity – Organizes job assignments & completes them accurately and on schedule. Maintains quality under pressure. Follows through on responsibilities and assignments	4	3	12	Although workload increased he (illegible)
Self-Motivation – Handles workload enthusiastically with little external prompting or assistance. Seeks increased responsibilities	4	2	8	Needs little prompting (illegible) issues without supervisor involvement.
Problem Solving/Decision Making – Recognizes problems, develops relevant	4	3	12	Remains claim, (illegible) decisions

facts, formulates alternative solutions & decides on appropriate conclusions. Makes innovative contributions such as new processes, methods, techniques.				
Supervisory Ability – Trains, motivates and develops subordinates to improve their overall performance, competence & skills.	4	3	12	Effectively supervises (illegible) as well as (illegible)
Teamwork – Works effectively and cooperatively with peers, subordinates & supervisors to accomplish job accountabilities.	4	3	12	Works well with (illegible)
Versatility – Capable of performing job functions outside of own position.	3	2	6	(illegible)
Promotability – Demonstrates skills and knowledge necessary for upward mobility.	4	2	8	Demonstrates (illegible)
Attendance – Possesses acceptable absence from work record and is punctual	4	2	8	Puts in regular hours on regular basis
Quality of Work – Completes work thoroughly and accurately.	4	3	12	Makes very few mistakes
Length of Service – Length of service with Cargill and/or predecessor company,	3	1	3	

if applicable				
Communication – Communicates effectively with supervisors, peers and subordinates. Has ability to listen and comprehend others' ideas or instructions.	4	3	12	Effective in written and verbal
Total Points:			**117**	

Evaluated by: /s Bob Pittard

Date: 5/30/96

Reviewed by: /s Robert F. Gettys
Date: 5/31/96

Rating

5 – Outstanding
4 – Very Good
3 – Good
2 – Below Average
1 – Unsatisfactory

Weight

3 – Very Important
2 - Important
1 – Less Important

Length of Service
5 – 20 + years
4 – 16-20 years
3 – 11-15 years
2 – 6-10 years
1 – 0-5 years

EMPLOYEE RATING FORM

GRAND TOTAL: 78

NAME: Carl Allen **CURRENT POSITION: Production Supervisor**
POSITION BEING EVALUATED FOR: Production Supervisor

CRITERIA	Rating	x Weight	= Points	Supporting Comments
Job knowledge – Possesses technical knowledge required for the job. Understands non-technical areas of the job and related matters	2	3	6	Considering length of time should be more proficient (illegible)
Productivity – Organizes job assignments & completes them accurately and on schedule. Maintains quality under pressure. Follows through on responsibilities and assignments	3	3	9	Meets (illegible)
Self-Motivation – Handles workload enthusiastically with little external prompting or assistance. Seeks increased responsibilities	3	2	6	Looks (illegible) areas to improve. Works (illegible) when needed.
Problem Solving/Decision Making – Recognizes problems, develops relevant	2	3	6	Does not always (illegible) making decisions

facts, formulates alternative solutions & decides on appropriate conclusions. Makes innovative contributions such as new processes, methods, techniques.				
Supervisory Ability – Trains, motivates and develops subordinates to improve their overall performance, competence & skills.	2	3	6	Needs to train employees to he can delegate tasks instead of doing them himself.
Teamwork – Works effectively and cooperatively with peers, subordinates & supervisors to accomplish job accountabilities.	3	3	9	Cooperates with all departments
Versatility – Capable of performing job functions outside of own position.	3	2	6	(illegible)
Promotability – Demonstrates skills and knowledge necessary for upward mobility.	2	2	4	(Illegible) forward
Attendance – Possesses acceptable absence from work record and is punctual	4	2	8	Rarely absent.
Quality of Work – Completes work thoroughly and accurately.	3	3	9	Most work completed as needed.
Length of Service – Length of service with Cargill and/or predecessor company,	3	1	3	

if applicable				
Communication – Communicates effectively with supervisors, peers and subordinates. Has ability to listen and comprehend others' ideas or instructions.	2	3	6	Written not always clear & precise.
Total Points:				

Evaluated by: /s Bob Pittard

Date: 5/31/96

Reviewed by: /s Robert F. Gettys

Date: 5/31/96

Rating

5 – Outstanding
4 – Very Good
3 – Good
2 – Below Average
1 – Unsatisfactory

Weight

3 – Very Important
2 - Important
1 – Less Important

Length of Service

5 – 20 + years
4 – 16-20 years
3 – 11-15 years
2 – 6-10 years
1 – 0-5 years

EMPLOYEE RATING FORM

NAME: John Patterson **CURRENT POSITION:** Safety/Personnel **GRAND TOTAL:** 108
POSITION BEING EVALUATED FOR: Production Supervisor

CRITERIA	Rating	x Weight	= Points	Supporting Comments
Job knowledge – Possesses technical knowledge required for the job. Understands non-technical areas of the job and related matters	4	3	12	Has education/training make effective in position
Productivity – Organizes job assignments & completes them accurately and on schedule. Maintains quality under pressure. Follows through on responsibilities and assignments	4	3	12	Demonstrates good follow through & organizational (illegible)
Self-Motivation – Handles workload enthusiastically with little external prompting or assistance. Seeks increased responsibilities	4	2	8	Good work ethic – (illegible) anything necessary (illegible)
Problem Solving/Decision Making –	4	3	9	Does well – but is (illegible) to take

Recognizes problems, develops relevant facts, formulates alternative solutions & decides on appropriate conclusions. Makes innovative contributions such as new processes, methods, techniques.				on more responsibility
Supervisory Ability – Trains, motivates and develops subordinates to improve their overall performance, competence & skills.	4	3	12	Provides most of (illegible) employees.
Teamwork – Works effectively and cooperatively with peers, subordinates & supervisors to accomplish job accountabilities.	4	3	12	Works well with everyone
Versatility – Capable of performing job functions outside of own position.	3	2	6	Helps out in (illegible)
Promotability – Demonstrates skills and knowledge necessary for upward mobility.	4	2	8	(illegible)
Attendance – Possesses acceptable absence from work record and is punctual	3	2	6	Acceptable
Quality of Work – Completes work thoroughly and accurately.	3	3	9	Completes work accurately & on time.
Length of Service – Length of service	2	1	2	

with Cargill and/or predecessor company, if applicable				
Communication – Communicates effectively with supervisors, peers and subordinates. Has ability to listen and comprehend others' ideas or instructions.	4	3	12	Has written most procedures for plant
Total Points:			**108**	

Evaluated by: /s Bob Pittard

Date: 5/30/96

Reviewed by: /s Robert F. Gettys

Date: 5/31/96

Rating

5 – Outstanding
4 – Very Good
3 – Good
2 – Below Average
1 – Unsatisfactory

Weight

3 – Very Important
2 - Important
1 – Less Important

Length of Service

5 – 20 + years
4 – 16-20 years
3 – 11-15 years
2 – 6-10 years
1 – 0-5 years

EMPLOYEE RATING FORM

GRAND TOTAL: 70

NAME: Gary Hooper **CURRENT POSITION: Production Supervisor**
POSITION BEING EVALUATED FOR: Production Supervisor

CRITERIA	Rating	x Weight	= Points	Supporting Comments
Job knowledge – Possesses technical knowledge required for the job. Understands non-technical areas of the job and related matters	3	3	9	With length of service (illegible)
Productivity – Organizes job assignments & completes them accurately and on schedule. Maintains quality under pressure. Follows through on responsibilities and assignments	3	3	9	Meet production deadlines
Self-Motivation – Handles workload enthusiastically with little external prompting or assistance. Seeks increased responsibilities	1	2	2	Little enthusiasm, carries negative impact to (illegible)
Problem Solving/Decision Making – Recognizes problems, develops relevant	2	3	6	Does not investigate all facts before making (illegible) lacks in

facts, formulates alternative solutions & decides on appropriate conclusions. Makes innovative contributions such as new processes, methods, techniques.				contribution of new ideas
Supervisory Ability – Trains, motivates and develops subordinates to improve their overall performance, competence & skills.	3	3	9	Does well (illegible)
Teamwork – Works effectively and cooperatively with peers, subordinates & supervisors to accomplish job accountabilities.	2	3	6	Needs supervisors assistance in working with other areas
Versatility – Capable of performing job functions outside of own position.	2	2	4	Capable but not willing to help others
Promotability – Demonstrates skills and knowledge necessary for upward mobility.	2	2	4	No demonstration (illegible)
Attendance – Possesses acceptable absence from work record and is punctual	2	2	4	Occasionally absent and tardy
Quality of Work – Completes work thoroughly and accurately.	2	3	6	Works is usually adequate
Length of Service – Length of service with Cargill and/or predecessor company,	5	1	5	

if applicable				
Communication – Communicates effectively with supervisors, peers and subordinates. Has ability to listen and comprehend others' ideas or instructions.	2	3	6	Needs improvement in written
Total Points:			**70**	

Evaluated by: /s Bob Pittard

Date: 5/30/96

Reviewed by: /s Robert F. Gettys
Date: 5/31/96

Rating

5 – Outstanding
4 – Very Good
3 – Good
2 – Below Average
1 – Unsatisfactory

Weight

3 – Very Important
2 - Important
1 – Less Important

Length of Service

5 – 20 + years
4 – 16-20 years
3 – 11-15 years
2 – 6-10 years
1 – 0-5 years

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHIVLLE DIVISION

GARY L. HOOPER,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 3-97-0650
	)	
CARGILL, INCORPORATED,	)	
	)	
Defendants.	)	

AFFIDAVIT OF CARL ALLEN

Carl Allen, being first duly sworn, states:

1. I am over eighteen years of age and make the following statements upon my personal knowledge.

2. Prior to June 1996, I was employed by Cargill Steel and Wire in Nashville, Tennessee, in the position of Second Shift Production Supervisor.

3. In June of 1996, Bob Pittard, Plant Manager, informed me that the company was having a reduction in force, that I was losing my job, but that I could stay until January. Mr. Pittard told me I could switch to the day shift and work, doing different things and filling in for people, directly for him. I asked if I could stay on nights and that I preferred to. Bob Pittard said that it would be alright.

4. Prior to this time, my wife and I had been considering a move to Jefferson City. I had arranged for a job, after being told of the reduction in force, in Morristown that would start in January.

5. After being advised of the reduction in force, I worked on the pickle line and continued receiving my salary.

6. A few weeks later, Mr. Pittard told me that the company had some production positions available and that I could fill one of them if I did not want to leave in January. I asked Mr. Pittard what would happen 6 months or one year down the road. Mr. Pittard said that he could not make any promises, but that he did not foresee anything happening. I told him I would need to talk to my wife about it. Mr. Pittard told me to take my time.

7. A few days later I told Mr. Pittard I would like to stay.

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

GARY L. HOOPER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 3-97 0650
	)	JUDGE NIXON
CARGIL INCORPORATED,	)	MAGISTRATE GRIFFIN
	)	(JURY DEMAND)
Defendant.	)	

STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF CARGILL'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 8(b)(7)(b), of the Local Rules of the United States District Court, Middle District of Tennessee, Plaintiff Gary L. Hooper, submits the following statements of undisputed facts in support of its Motion for Summary Judgment:

1. Cargill employed Hooper at its Nashville Steel and Wire plant until June 1996. [Complaint].

RESPONSE: Admitted only for purposes of this motion. However, plaintiff would further state that he had worked for Mitchell Steel which became Cargill, Incorporated in 1983 for over 24 years before his termination. Plaintiff was 46 years old at the time of his termination. [Plaintiff affidavit ¶2-4, 38, exhibit 2].

2. Cargill terminated Hooper's employment as a result of a plant realignment and reduction in force. [Cargill's Answers and Objections to First Set of Interrogatories No. 2; Depo. of G. Hooper, Ex. 17; Depo. of D. Lewis, Ex. 8].

RESPONSE: Denied. Plaintiff Hooper was fired as a result of age discrimination in that the defendant had made the decision to fire plaintiff Hooper on May 13, 1996 despite the fact that he had received excellent evaluations up until this point and received his first and only bad evaluation on May 31, 1996 after the May 13, 1996 chart had been drawn up indicating the Plaintiff would be fired. [See affidavit Hooper ¶13-15 and May 13, 1996 charge Exhibit 1 and Hooper evaluations Exhibit 3]. Robert Tigg was 34 years old and he was kept by the defendant. Despite the fact that defendant claims the poor evaluation of Plaintiff Hooper was the result of higher standards applied by the new Frank Gettys, Robert Tigg received the exact same evaluation in October 1995, signed by Frank Gettys that he received in 1994. [See Tigg evaluations exhibit 4]. Plaintiff was told he was being fired because he earned too much and he earned too much because of his 24 years employment with the Defendant. [Hooper Affidavit ¶17-18].

3. Frank Gettys (then age 44) became the General manager of Cargill's Nashville Steel and Wire plant in May of 1995. [Cargill's Answers and Objections to First Set of Interrogatories No. 17; Depo. of F. Gettys at 39-40].

RESPONSE: Admitted for purposes of this motion.

4. In Gettys' business judgment, a number of issues needed to be addressed at that time, including whether the plant should be shut down and its operations discontinued. [Cargill's Answers and Objections to First Set of Interrogatories No. 17; Depo. of F. Gettys at 39-40].

RESPONSE: Admitted only for purposes of this motion.

5. In Gettys' business judgment, inventory levels were entirely too high. The plant had in excess of 80,000 tons of inventory (today the facility operates with 35,000 tons).

RESPONSE: Admitted only for purposes of this motion.

6. In Gettys' business judgment, the Quality System was not working in the best interests of the company or its customers (today the facility is IS09002 and QS9000 registered).

[Cargill's Answers and Objections to First Set of Interrogatories No. 17; Depo. of F. Gettys at 39-40].

* * * *

with the employees in the plant, Pittard determined who he thought was best suited for the "new, realigned" positions that would remain at the plant. [Depo. of B. Pittard at 96-98, 101; Cargill's Answers and Objections to First Set of Interrogatories No. 19].

RESPONSE: Denied. Pittard fired the older Hooper (age 46) and kept the younger Tigg (age 34) despite the following facts:

> 1. Plaintiff Hooper had been a production supervisor for over fourteen (14) to fifteen (15) years supervising thirty (30) to forty (40) employees and for approximately eight (8) to nine (9) years served as a supervisor over both production and scheduling shipping and receiving departments. [Hooper affidavit ¶22-30].
>
> 2. Gary Hooper was 46 years old at the date of his termination and the Defendant chose to keep a 34 year old employee, Robert Tigg, in place of Plaintiff. Robert Tigg had no supervisory authority until March 1996, approximately three (3) months before Plaintiff's termination and from March of 1996 through Plaintiff's termination, Robert Tigg had only supervised approximately seven (7) employees in the shipping and receiving department. [Hooper affidavit ¶32-36, 38].

3. Robert Tigg had no supervisory experience whatsoever in the production department prior to assuming the supervisor's role over both shipping, receiving, scheduling and production. [Hooper affidavit ¶34].

4. Defendant, on May 13, 1996, drew up a chart indicating that the Plaintiff was being terminated in a reduction in force. [May 13, 1996 Memo, exhibit 1].

5. After drawing up the chart, Plaintiff for the first time received a terrible evaluation. [Hooper affidavit ¶16-17].

6. Only the Plaintiff and Carl Allen, the two (2) oldest salaried management employees were trashed in the evaluations while the other younger employees were not. [Evaluations of Hooper, Allen, Tigg and Patterson exhibits 3-7].

7. Despite Defendant's contention that it had raised the standards for evaluations, Robert Tigg received the exact word for word evaluation for the period before the standards were raised and after Frank Gettys had become the plant manager. [Tigg evaluations exhibit 4].

8. Despite the fact that Gary Hooper, John Patterson, and Carl Allen received new evaluations, in the summer of 1996 Robert Tigg did not. [Tigg evaluations exhibit 4].

9. Bob Pittard, the employee responsible for filling out the grids, cannot recall why Gary Hooper was graded the way he was in numerous areas. [Pittard Deposition pgs. 117-120]/

10. Gary Hooper was informed he was being let go because he earned too much money and his

salary was based upon his years of service with the Defendant. [Hooper affidavit ¶18].

11. Gary Hooper had received excellent evaluations up until the time of the reduction in force. [Hooper evaluations exhibit 3].

36. In Pittard's business judgment, Robert Tigg's past and potential performance better suited him to perform all the duties of the new first shift production supervisor position. [Depo. of B. Pittard t 97-98, 101].

RESPONSE: Denied. Bob Pittard felt Mr. Hooper had more experience in the production department and did not know how Plaintiff Hooper compared to Robert Tigg in the production area of the department nor how he compared to Mr. Tigg with regard to job knowledge with regard to the production department nor how he would compare to Mr. Tigg in regard to coordinating the work that needed to be done in the production area nor did he have an opinion with regard to how Mr. Hooper's ability with regard to how Mr. Hooper's ability to solve problems compared to Mr. Tigg ability to solve problems nor did he know how Mr. Hooper's ability with regard to productivity in the production department compared to Mr. Tigg ability with regard to productivity in the production department nor did he know how Mr. Hooper's ability to supervise employees under

him in the production department compared to Mr. Tigg's ability to supervise employees under him in the production department. [Pittard deposition

* * *

and if an employee wishes to transfer and has the skills necessary, Cargill, Incorporated will try to accommodate its employee in this matter. [Lewis depositions pg. 14, 25]. Mr. Lewis, the human resources director, testified that when Nashville decided to go through the reduction in force no one, to his knowledge, even looked into whether or not they could transfer these employees to a different location. [Lewis deposition pg. 74]. Mr. Lewis handles the transfers for all of Cargill Steel and if an employee requests a transfer for whatever reason, he has the ability to look into whether or not a transfer would be possible. [Lewis deposition pg. 76].

55. Each employee separated in the reduction in force received a separation package. Hooper received gross severance pay in the amount of $24,278.85, representing six months salary. [Depo. of B. Pittard, Ex. 22; Depo. of G. Hooper at 122 and Ex. 19; Depo. of D. Lewis, Ex. 8, p. 1]. Cargill also paid Hooper

approximately $4,000 in vacation pay. [Depo. of G. Hooper at 122].

RESPONSE: Admitted for purposes of this motion.

56. Following the plant realignment and reduction in force, Tigg did not replace Hooper. Tigg continues to perform his former duties supervising the shipping and scheduling departments and also supervised the first shift production employees formerly supervised by Hooper. [Depo. of G. Hooper at 75-76, 176; Depo. of B. Pittard t 84, 86, 90; Depo. of R. Tigg at 5-6, 26-27, 32].

RESPONSE: Admitted only for purposes of this motion.

57. Hooper admits that Tigg was employed prior to the reduction in force and was not a new hire. [Depo. of G. Hooper at 175].

RESPONSE: Admitted only for purposes of this motion. However, Plaintiff would state that Tigg had never been in a supervisory position until March 1996 and was only responsible for writing up orders in the scheduling department until that point in time. In March 1996 he became the supervisor in the scheduling and shipping, receiving department and was

only responsible for supervising approximately seven (7) employees. [Hooper affidavit ¶33-35][exhibit 2].

58. Hooper admits that prior to the reduction in force, Tigg was not a "subordinate" but, as the Production Coordinator, was on "the same level" of management. [Depo. of G. Hooper at 151].

RESPONSE: Admitted only for purposes of this motion. However, Tigg had only held this position supervising only seven (7) employees for approximately three (3) months before the reduction in force. [Hooper affidavit ¶33-35][exhibit 2].

59. After the reduction in force, Tigg began performing Hooper's former supervisory duties **in addition to his own** and that Hooper's remaining duties were distributed among other existing employees who remained after the reduction in force. [Depo. of G. Hooper at 75-76, 176; Depo. of B. Pittard t 84, 86, 90; Depo. of R. Tigg at 5-6, 26-27, 32].

RESPONSE: Admitted only for purposes of this motion. However, Plaintiff would state that it was his understanding that Robert Tigg assumed the majority of his job

duties. [Hooper affidavit ¶36][See also Defendant's Fact No. 61].

60. Tigg did not receive a pay raise at the time he took over these additional duties. [Depo. of R. Tigg at 46].

RESPONSE: Admitted only for purposes of this motion.

61. Hooper also formerly performed certain administrative duties (purchasing of plant supplies, handling employee records and time cards) that Tigg did not pick up and that are now being performed by other employees who were employed prior to the reduction in force. These employees perform these duties in addition to their own duties. [Depo. of B. Pittard at 86].

RESPONSE: Admitted only for purposes of this motion.

62. Hooper admittedly does not dispute that Cargill's Steel and Wire plant in Nashville . . .

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

GARY L. HOOPER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 3-97 0650
	)	JUDGE NIXON
CARGIL INCORPORATED,	)	MAGISTRATE GRIFFIN
	)	(JURY DEMAND)
Defendant.	)	

AFFIDAVIT OF GARY L. HOOPER

Gary L. Hooper having been duly sworn in accordance with law would state as follows:

1. I am Gary L. Hooper and I am the Plaintiff in the above captioned lawsuit.

2. On June 2, 1972, I became employed by Mitchell Steel Company located in Nashville, Davidson County, Tennessee.

3. In 1983, the Defendant, Cargill Incorporated purchased Mitchell Steel Company.

4. From 1983 through June 1996 I was employed as the plant production supervisor for Cargill Incorporated on a salaried basis.

5. During the course of my employment for Mitchell Steel and Cargill Incorporated I received evaluations on a routine basis.

6. In September 1985 I received a performance evaluation by Bob Pittard which ranged from good to very good and which contained comments as follows:

> Gary has twelve (12) years experience as a slitter operator, maintenance, quality control and production supervisor.
>
> Has organized his area well and will improve in plant efficiency with his new responsibilities.
>
> Gary has a good attitude and always takes the responsibility to get the job done right.
>
> Gary's experience enables him to make quick machine decisions with good results.
>
> Gary communicates well with office and plant personnel.

7. Additionally, I was informed in 1986 that I had excellent cleanliness and a big improvement in new employees training and improved training of old employees. As well as a good job of communicating with scheduling and sales.

8. My evaluation that I received in September 1986 by Bob Pittard gave me a performance evaluation ranging once again good to very good and provided comments as follows:

> Gary has thirteen (13) years experience as a slitter operator, maintenance, quality control and production.
>
> Gary combines quality with productivity on all job assignments.
>
> Gary has good attitude and needs little prompting in his job.
>
> Gary's experience enables him to make appropriate machine decisions with good results.
>
> Gary has improved his supervisory skills through production supervisor's seminar and E.I. team leader training.
>
> Cooperates effectively with all departments.

9. I was given an overall performance rating in September 1986 by Bob Pittard as follows:

> Gary has improved his performance throughout the year through training and work experience. Gary has made valuable contributions in capitol equipment purchases.

10. In September 1988 I received a performance review once again by Bob Pittard which rated me from good to very good and provided comments similar to those given in 1986 by providing that I had thirteen (13) years experience as a slitter operator, maintenance, quality control and production supervisor and opposed to the twelve (12) years experience listed in the 1987 performance review.

11. I received a similar review rating from good to very good by Bob Pittard in May 1990, December 1990 and February 20, 1992.

12. In 1994, I received an annual objective, performance review and career planning evaluation signed by Bob Pittard giving me a very good performance evaluation in all areas except for verbal communication in which I received a good evaluation. The individual comments included the following:

> Gary has excellent knowledge of all plant machinery and of all plant process. He is always willing to share his knowledge and experience to help others learn.
>
> Gary is responsible for first shift production and in addition worked with vendors and is responsible for plant supplies. He handles these tasks efficiently.
>
> Gary has always done what his position requires. The last few months he has shown more self-motivation and should continue. He has high standards for his own and his employees work.
>
> Gary's knowledge of the plant coupled with his experience as a supervisor give him the background to make appropriate decisions. He weighs alternatives and consequences before acting.
>
> Gary does a very good job of being realistic and objective with employees. He has done a very good job of training and developing the first sift lead men.

> Gary works well with all departments, communicates effectively with vendors, volunteers new ideas and suggestions and is also willing to listen to the suggestions of others.
>
> Gary does a very good job with a position of great responsibility. He has shown improvement in his self motivation and this is carried over to his employees. He makes valuable contributions to capitol equipment purchases and the day to day operations.

13. After receiving the very good performance evaluation of 1994, I was not evaluated again until I received an exceptionally negative evaluation on May 31, 1996.

14. I personally evaluated about 40 employees. I was never told by anyone that the standards had changed after Frank Gettys became General Manager.

15. Before I received the evaluation in 1996, I was shown an organizational chart by Carl Allen which he had found on the desk of Bob Pittard dated May 13, 1996, which showed me, who had reached the age of 46 being replaced by another employee, Robert Tiggs, who was under the age of 40.

16. I knew after I saw the May 13, 1996 organizational chart that Cargill Steel had intentions in firing me. However, up until this point in time I had always received good to very good

evaluations and very good evaluations given to me and signed by Bob Pittard in 1994.

17. On May 30, 1996 I received the first unsatisfactory performance review I had ever received throughout the course of my 24 years employment with Mitchell Steel Company which then became Cargill Incorporated. I was told by Russell Drake that he was only doing what he was told to do.

18. One June 27, 1996, I was told I was being discharged from my employment as plant production supervisor and was told I was no longer needed. I was additionally informed by Russell Drake a member of upper management and present at my termination meeting that I was being terminated because I earned too much.

19. Each year of working for Mitchell Steel Company and Cargill Incorporated I received annual raises thus, the amount of money I made was directly related to my age.

20. Bob Pittard, plant manager, was the one who informed me that I was being terminated. I have worked with Bob Pittard for approximately thirteen (13) to fourteen (14) years and I considered him not only my supervisor but my friend up until the date he terminated me. I have spoken with Bob Pittard

numerous times, in various conversations, about my age. For instance, when my birthday would roll around I would make remarks along the lines of can you believe I am this old already.

21. I was never offered a transfer to another Cargill Incorporated plant and if I had been offered a transfer because I was the main bread winner of the family I would have most certainly taken the transfer.

22. I was the production supervisor for approximately 14 to 15 years before I was terminated. At one time I was the supervisor over the entire plant meaning I was the supervisor for production and was in charge of shipping and receiving and scheduling. I did this for approximately 8 to 9 years from approximately 1983 to about 199.

23. Cargill Incorporated in approximately 1991 had a study done by an outside consulting firm and it is my understanding that Cargill Incorporated was informed that this was too much work for only one (1) employee to perform.

24. Thus, from 1991 until March 1996, Mike Otto remained in charge of shipping and receiving and scheduling up until he quit his employment with Cargill in March 1996.

25. Up until March 1996 Robert Tigg worked under Mike Otto in the shipping, receiving and scheduling department.

26. From 1991 until the date of my termination I worked as the production supervisor. This position required me to supervise approximately thirty (30) to forty (40) employees. I was responsible for overseeing the plant operations every day. I was responsible for buying supplies, speaking with vendors and working out contracts for plant supplies. Additionally, I served as safety coordinator for a time and made sure that the plant was safe. I received safety awards for this additional job duty.

27. As production supervisor I was responsible for making sure the production stayed up. If the machine broke down I had to make decisions as to how to fix the machine.

28. As production supervisor I did the scheduling for the thirty (30) to forty (40) hourly employees under me. Additionally, I was responsible for evaluating these employees.

29. I was responsible for training the supervisors in the production department. I trained John Patterson who is one of the individuals who was compared to me and scored much higher than me in the grid prepared by Cargill Incorporated to justify my termination.

30. As the production supervisor I supervised three (3) different departments, the pickle line, the slitter department and the packaging department.

31. For a very short time I had Robert Tigg, who is the individual who assumed my job duties after I was terminated, working under me as an hourly worker.

32. While I was production supervisor I was also the supervisor over shipping, receiving and scheduling up until 1991. After 1991, my department worked closely with the shipping receiving and scheduling department and as a result of my job duties I was well aware of the various job duties of the individuals in the shipping, receiving and scheduling department.

33. Up until March 1996, Robert Tigg was not a supervisor in my department. Robert Tigg was responsible for writing up orders in the scheduling department and worked under Mike Otto until Mike Otto terminated his employment with Cargill Incorporated in March 1996.

34. Up until March 1996 Robert Tigg did not supervise any employees nor did he have any management duties.

35. After March 1996 Robert Tigg was only responsible for supervising approximately seven (7) employees in the shipping and receiving department.

36. It is my understanding that after I was terminated from Cargill Incorporated, Robert Tigg was given my old position of being the supervisor over both production, shipping, receiving and scheduling departments. This is the position that I held for approximately eight (8) to nine (9) years.

37. It is my understanding that I performed well as a supervisor of both the production department and shipping, receiving and scheduling department and I received no complaints about my job performance during this time.

38. I was 46 years old at the time of my termination and the majority of my job duties were given to Robert Tigg a 34 year old who had only supervised about seven (7) employees for approximately three (3) months prior to my termination.

FURTHER AFFIANT SAITH NOT.

/s Gary L. Hooper
GARY L. HOOPER

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

Sworn to and subscribed before me on this 7th day of April 1998.

/s Amanda J. Epton
NOTARY PUBLIC

MY COMMISSION EXPIRES:

My Commission Expires Jan. 26 2002

CARGILL
INTERNAL
MEMO

June 13, 1996

TO: Pete Price

FROM: Dave Lewis

RE: **Reduction in Force**

Name:	Gary Hooper	Carl Allen	Durenda Hood	Maria Burkett
Position:	Prod. Supv.	Prod. Supv	Plant Clerk	Inside Sales Rep.
DOB:	11/1/49	1/5/42	7/16/50	8/30/60
DOH:	6/2/72	2/8/82	5/1/79	1/4/88
Sex:	Male	Male	Female	Female
Race:	Caucasian	Caucasian	Caucasian	Caucasian
Salary:	$50,500	$39,500	$28,200	$32,000
Severance	$24,278.85	$11,394.23	$9,761.54	$5,538.46

Cargill Steel & Wire is requesting approval for the Reduction in Force of four salaried and six production hourly employees at our Nashville, Tennessee Service Center. Due to a shift in business strategy and change in product mix, the Nashville facility will produce less tons on a reduced operating schedule consequently, less people are needed. Salaried positions being eliminated re (1) Shift Supervisor, (1) Purchasing Clerk, (1) Inside Sales Rep. and (1) Personnel and Safety Rep. Hourly positions being eliminated are (2) Crane Operators, (2) Slitter set-up, (1) Packaging Operator, and (1) Laborer.

The Cargill Grid Process was used to determine the persons to be severed (see attached). Our objective in applying the Grid Process was to have the best performers with the highest potential remaining following the reduction. Consequently, employees whose position were being eliminated were compared to other employees who occupied permanent positions. The grids were completed by the Nashville location manager with the most knowledge of the employee's job performance.

One potential problem that must be pointed out is that historically, both Gary Hooper and Carl Allen have experience Good to Very Good performance reviews. However, under new leadership at the Nashville facility, the bar on performance expectations has been raised significantly, resulting in lower performance ratings by both employees.

Carl Allen will be eligible for early retirement on 1/5/97. We recommend that Carl be notified of the RIF and placed on special projects until that time. The facility management feels that Carl will be very receptive to this approach.

In addition to the salaried employees selected for the RIF as previously mentioned, six hourly production employees have also been identified for the RIF. The six Union free employees were selected using the grid process (see attached). All scores are consistent with past employee performance reviews.

If approved, our plan is to implement the reduction on 6/28/96. We request the severed salaried employees be given the standard Cargill severance package with three months of health care continuation paid for by the company. We recommend the production hourly employees receive severance up to a cap of 8 weeks with two months health care continuation paid for by the company.

Please let me know if you have any questions.

Plant Employees Average Act
Salaried 39.8
Hourly 39.2

Q. And what did you tell Mr. Drake?

A. I don't recall the specifics.

Q. When did you tell Mr. Drake that you thought Mr. Hooper had a problem with his effort?

A. I don't recall the date.

Q. Did you instruct Mr. Drake to have any conversations with Mr. Hooper about your perceived problems with his efforts?

A. I don't believe so.

Q. Let's go down to Problem Solving and Decision-Making. Did you see any changes in Mr. Hooper's ability with regard to problem solving and decision-making that occurred from 1993 to 1996?

A. I don't recall any changes.

Q. With regard to his written communication, did you see any changes in Mr. Hooper's ability to communicate from 1993 to 1996?

A. Not that I recall.

Q. With regard to teamwork, did you see any changes in Mr. Hooper's ability to get along with the others with regard to teamwork from 1993 to 1996?

A. I'm just not sure about that time period.

Q. What –

A. Not that – I guess, not that I recall.

Q. Now, with regard to supervision, did you see any changes in Mr. Hooper's ability to supervise the other employees that occurred from 1993 to 1996?

A. Not that I recall.

Q. Now, were you aware that Mr. Hooper refused to sign this evaluation at the time you signed it?

A. Not at the time I signed it.

Q. Were you made aware that Mr. Hooper refused to sign this evaluation?

A. Yes.

Q. And who told you?

A. Mr. Drake.

Q. When did he tell you?

A. I don't recall, but I'm sure it was at the time that it happened.

Q. And did you confront Mr. Hooper about why he was refusing to sign this evaluation?

A. No.

Q. Did Mr. Drake, to your knowledge, have any discussions with Mr. Hooper about why he was refusing to sign the evaluation?

A. I don't know.

MS. STEINER: Can we have that marked

* * *

A. Can you be more specific.

Q. How did Mr. Hooper's experience in this area compare to Mr. Tigg's experience in this area?

A. In which area?

Q. Production.

A. Supervision of hourly employees, or pieces of equipment, or – I'm just not –

Q. I you don't understand the questions, that's fine. You can say that, too.

In terms of being the supervisor in the production department, of the production area, how did Mr. Hooper's experience compare to that of Mr. Tigg's?

A. Well, Mr. Hooper had more experience.

Q. Now, with regard to education and training, how did Mr. Hooper compare to Mr. Tigg in the production area of the production department?

A. I don't know.

Q. With regard to job knowledge, how did Mr. Hooper compare to Mr. Tigg with regard to the production area of the production department?

A. I don't know.

Q. With regard to how Mr. Hooper could coordinate the work that needed to be done down in the production area, the production department, how did Mr. Hooper's ability to coordinate the work compare with Mr. Tigg's?

A. I don't know.

Q. With regard to Mr. Hooper's ability to solve problems with regard to problems that would arise in the production department, or the production area, how did Mr. Hooper's ability compare with Mr. Tigg's?

A. I just don't know.

Q. With regard to Mr. Hooper's ability with regard to productivity in the production department and the

production area, how did that compare to Mr. Tigg's ability with regard to production?

A. I don't think I can answer that.

Q. With regard to Mr. Hooper's ability to supervise the employees under him in the production department, of the production area, how did that compare to Mr. Tigg's ability?

A. I don't see how I can answer that question.

Q. Okay. Now, I believe you said that this was your first attempt to decide how to reorganize the plant, this charge that's dated May 13, '96.

A. Yes.

Q. Did you draw up any subsequent charges?

* * *

period of time?

A. I don't know.

Q. Did you keep a record of that?

A. No.

Q. Did you, or anyone, to your knowledge, speak with Mr. Hooper about being tardy or late or absent?

A. Yes.

Q. Who spoke with him?

A. Mr. Drake.

Q. Do you recall when he spoke with him about this?

A. No, I don't.

Q. Do you recall the year that he spoke with him about this?

A. No, I don't. I don't know if it was – I don't know.

Q. Now, for quality of work, you have given Mr. Hooper a two. What facts do you have to justify giving him a two?

A. I don't remember.

Q. For length of service – skip length of service. For communication, you've given him a two. What facts do you have to justify giving him a two?

A. Just personal knowledge of his written correspondence.

Q. Did it have anything to do with how he orally communicated with co-workers?

A. I don't think this – I think this says "written" here.

Q. Okay. With regard to problem solving, you gave him a two. What facts do you have?

A. I don't recall.

Q. With regard to job knowledge, you gave him a three. What facts do you have to justify that?

A. In relation to the new position, I saw problems in the scheduling area, mainly.

Q. With regard to versatility, you gave him a two. What facts do you have to justify that?

A. I don't recall.

Q. With regard to promotability, you gave him a two. What facts do you have to justify that?

A. I don't recall.

Q. With regard to supervisory ability, you gave him a three. What facts do you have to justify that?

A. I don't recall.

Q. With regard to productivity, you gave him a three. What facts do you have to justify that?

A. None, other than that's listed.

Q. And from my –

A. "Meets production deadlines."

Q. I guess my questions is, why did you give him a three as opposed to a five in that area?

A. That was just my judgment.

Q. And why did you give him a one in self-motivation, as opposed to a three or a five?

A. It was just my judgment.

Q. With regard to teamwork, why did you give him a two as opposed to a four or a five?

A. Well, just what I have listed. It's my judgment of what I have listed.

Q. And is that a fair statement, that it was just your judgment as to whether or not you were going to give him a two or a three or four or a five with all these areas?

A. Sure.

Q. Now, did you review anything before you did the employee rating form for Mr. Hooper?

A. I don't recall. I don't know if – I don't know if I had his review at this time or not, his latest review. I don't know if I had it.

Q. And that would have been the review prepared by Mr. Drake?

A. Yes.

* * *

A. Yeah.

Q. What type company do you think he would not be an asset to?

A. I don't think he would be an asset to you, as an attorney, without –

Q. Okay. What about a steel plant? Do you think he would be an asset to someone in the same line of business as Cargill?

A. I think in the right circumstances, yes.

Q. Okay. And would you strongly recommend him.

A. Well, I couldn't say that, because I couldn't say that to any company. I mean, it would depend on the situation.

Q. Would there be some situations when you would strongly recommend Gary Hooper to work for another company?

A. I believe so.

MS. STEINER: Can we have that marked the next numbered exhibit.

(Whereupon, the previously mentioned document was marked Exhibit No. 21.)

Q. (BY MS. STEINER) Now, when you decided to compare Mr. Hooper to Mr. Allen, to Mr. Tigg, and to –

A. Brewer.

Q. -- Mr. Brewer, and Mr. Patterson, who told you to compare those five to each other?

A. I believe that was from Dave Lewis. I think that was from Dave Lewis.

Q. Do you know why he picked those five and said those five should be compared?

A. No, I don't.

Q. Did he ask you any questions about what categories these people were in, what job positions?

A. Yes, Well, he knew. He had access to what their positions were.

Q. Well, besides having access to what their positions were, did he ask any questions of you about their specific job duties?

A. I don't recall any.

Q. Have you ever been inside another Cargill plant, besides Nashville?

A. Yes.

Q. Are the setups similar?

A. It would depend on what plant you are referring to and what you mean by "setup."

Q. Meaning, if one plant has a production supervisor, another plant might call them something different, and they might have duties that vary a

* * *

SEPARATION NOTICE Date 6/28 1996

TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY

on 6/28 1996 we cease to employ

Gary Hooper 409-80-4082

(name of worker) (Social Security No.)

Employed since 6/2 1972 as Production

(date entered employment (specific

Supr.A at Plant

occupation (where work performed)

Reason for Separation (Check Reason and Explain if Required)

X (a) Lack of Work (c) Discharged (Explain below)

(b)Voluntarily quit

(explain below)

This employee received wages in lieu of notice in amount of $24,278.85 equal to wage from _____ to verified as separation pay, not wages in lieu. 782.8500 (G.H.)

Reason for separation that may result in disqualification should be indicated hereon. Subsequent statements may not constitute grounds for disqualification.

Remarks Reduction of personnel

Employer Cargill Steel & Wire

By: /s Bob Pittard Title Plant Manager

Address 600 Cowan Street, Nashville, TN 37207

Reg. No. 2-44-0177680

A. Yeah.

Q. What type company do you think he would not be an asset to?

A. I don't think he would be an asset to you, as an attorney, without –

Q. Okay. What about a steel plant? Do you think he would be an asset to someone in the same line of business as Cargill?

A. I think in the right circumstances, yes.

Q. Okay. And would you strongly recommend him.

A. Well, I couldn't say that, because I couldn't say that to any company. I mean, it would depend on the situation.

Q. Would there be some situations when you would strongly recommend Gary Hooper to work for another company?

A. I believe so.

MS. STEINER: Can we have that marked the next numbered exhibit.

(Whereupon, the previously mentioned document was marked Exhibit No. 21.)

Q. (BY MS. STEINER) Now, when you decided to compare Mr. Hooper to Mr. Allen, to Mr. Tigg, and

* * *

July 8, 1996

To whom it may concern:

Gary Hooper has been a valuable employee for Cargill Steel & Wire. His knowledge of the steel business, his knowledge of machinery and his dependability would make him an asset to any company.

I strongly recommend Gary to any company.

If you have any questions or I can be of any further assistance, please feel free to call me at anytime.

Sincerely,

s/ Russell Drake

Russell Drake
Quality Assurance Mgr.
Cargill Steel & Wire
Nashville, TN
615/782-8566

Q. Is that your handwriting?

A. Yes.

Q. Is that your letter?

A. Yes.

MS. STEINER: Could we have that marked Exhibit 2?

(Whereupon, the previously mentioned document was marked Exhibit No. 2.)

Q. (BY MS. STEINER) Are the statements contained –

MR. WISE: Let's identify what it is just for the record.

MS. STEINER: That is a July 8th, 1996 letter addressed To Whom It May Concern from Mr. Drake.

MR. WISE: Fine.

Q. (BY MS. STEINER) Are the statements contained in that letter true and accurate?

A. Yes.

Q. Did anyone ever discuss with you the reason behind the reduction in force?

Supreme Court, U.S.
FILED
JAN 19 2000
OFFICE OF THE CLERK

No. 99-1059

IN THE

Supreme Court of the United States

GARY L. HOOPER,

Petitioner,

v.

CARGILL, INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Cargill, Incorporated, has no parent corporation and no publicly held company owns 10% or more of its stock.

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Statutes:

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Tenn. Code Ann. §§ 4-21-101 *et seq.* 1

STATEMENT OF THE CASE

A. Procedural History

On June 17, 1997, Petitioner, Gary Hooper ("Hooper"), filed his Complaint in the United States District Court for the Middle District of Tennessee, asserting claims under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, and the Tennessee Human Rights Act ("THRA"), Tenn. Code Ann. §§ 4-21-101 *et seq.* (Joint Appendix ("App.") at 6).[1] Respondent, Cargill, Inc. ("Cargill"), filed its Answer on July 25, 1997. (App. at 24). On March 13, 1998, Cargill filed a Motion for Summary Judgment. (App. at 31). On June 12, 1998, the District Court entered its Memorandum Opinion (App. at 10) and Order (App. at 22) granting Cargill's Motion for Summary Judgment.

On June 23, 1998, Hooper filed a Notice of Appeal from the District Court's Summary Judgment Order. (App. at 23). On July 23, 1999, the Sixth Circuit Court of Appeals issued its decision affirming the District Court's grant of summary judgment to Cargill (Petition for Writ of Certiorari ("Petition") at A-1).[2] The Sixth Circuit Court of Appeals denied Hooper's Petition for Rehearing and Suggestion for Rehearing *En Banc* on September 23, 1999. (Petition at A-18). Finally, on December 21, 1999, Hooper filed his Petition for Writ of Certiorari to the Supreme Court of the United States, to which Cargill now timely responds.

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1. All citations to the Joint Appendix on file with the Sixth Circuit Court of Appeals are referenced herein as "App."

2. All citations to the Petition for Writ of Certiorari are referenced herein as "Petition."

B. Events Leading To the Reduction in Force at Cargill

Hooper was employed at Cargill's steel and wire facility in Nashville, Tennessee. As of May 1995, the Nashville facility was not meeting corporate expectations. Consequently, Cargill removed the general manager, and Frank Gettys became the new general manager in May 1995. (App. 10-11). Gettys was charged to "turn around" the Nashville facility.[3] To further complicate the operational and financial problems in Nashville, Cargill received word in March 1996 that its largest customer, Johnson Controls, Inc. ("JCI"), would no longer purchase steel from the Nashville facility. The Nashville facility stood to lose 20% of its business because of this decision. (App. at 108, 123).[4]

Because of the significant drop in needed production levels, Gettys instructed Bob Pittard, the Plant Manager, to "size the operation" (reduce the staff) to a level appropriate to produce the lesser amount of steel after the JCI contract expired. (App. at 107-08, 119, 122, 124-25, 131, 162, 180).

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3. To turn the plant around, Gettys initiated several cost saving initiatives. Specifically, Gettys: (1) eliminated the third shift; (2) avoided replacing employees whose employment terminated; (3) lowered the level of inventory from 80,000 tons of steel to 35,000 tons; (4) eliminated the guard service (which saved in excess of $80,000 per year); (5) reduced the facility's working capital by 43%; and (6) reduced the facility's short-term interest from $114,000 per month to $15,000 per month. (App. at 10-11, 107-08, 122-23, 127-28, 179).

4. Prior to the JCI loss, the Nashville facility was producing 15,000 tons per month. At the end of the JCI contract, in June 1996, the facility's volume was only 11,000 tons per month. Additionally, total sales for fiscal year 1996 (June 1995-May 1996) dropped over 29% from fiscal year 1995. (App. at 107-08, 122-23, 179).

Gettys did not give Pittard any specific direction on how many positions to eliminate or who to select. (App. at 124-25, 180).

C. Hooper's Dismissal as Part of the Reduction in Force

Pittard began reviewing the operation in May 1996 to resize and realign the plant's management structure and salaried work force.[5] (App. at 134, 181-82). Pittard did not look at salaries or a specific number of positions to eliminate, but rather considered the number of people and positions that would be needed to operate at the reduced level. (App. at 122, 135, 171, 182-83). After an extensive review, Pittard decided to eliminate certain positions and to combine the functions of other positions.

Before the realignment, Hooper held the position of First Shift Production Supervisor (supervising the first shift production employees) and Robert Tigg held the position of Production Coordinator (supervising the shipping department and the scheduling department). (App. at 203, 211, 214). In Pittard's proposal to Gettys about resizing and realigning the salaried work force, the job title of Production Coordinator (Tigg's old position) was eliminated. Many of the duties of the First Shift Production Supervisor (Hooper's

5. When Gettys arrived at the Nashville facility in May 1995, the production employees reported to Production Supervisors (Gary Hooper, then age 45, and Carl Allen, then age 53), who reported to a Production Manager (Russell Drake, then age 43), who, in turn, reported to the Plant Manager (Bob Pittard, then age 41). (App. at 105-06, 110-14, 141-44). Eventually, the Quality Assurance Manager resigned and Drake moved into that position and his former position of Production Manager was eliminated. (App. at 88-89, 153). Thereafter, the Production Supervisors, Hooper and Allen, reported directly to the Plant Manager, Pittard. (App. at 89-90, 153).

position) and the duties of the Production Coordinator (Tigg's position) would be combined. Further, the Second Shift Production Supervisor's duties and the duties of the Safety Coordinator would also be merged into one position. (App. at 188, 209-10, 212-14).[6] As a result of this consolidation, there would be fewer supervisors and the remaining supervisors would be doing a greater variety of work. (App. at 131).

Pittard determined who he thought was best suited for the "new, realigned" positions that would remain. (App. at 109, 190-93). Pittard concluded that Robert Tigg's past and potential performance and skills better suited him to perform all of the duties of the new First Shift Production Supervisor position.[7] (App. at 191-93). Specifically, Tigg possessed the computer skills necessary for the new position; skills that Hooper did not have. (App. at 191; Petition at A-34). Accordingly, in Pittard's business judgment, Hooper "did not have the best performance for the position that was

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6. In addition, other jobs would be eliminated (such as the Production Clerk) and their duties merged into and assumed by other existing positions, resulting in new positions with greater fields of responsibility. (App. at 188, 209-10, 212-14).

7. As a result of the realignment, Tigg, without any adjustment in pay, moved into the "new" First Shift Production Supervisor position, where he continued to supervise the shipping and scheduling departments, in addition to supervising the first shift production employees who were formerly supervised by Hooper. (App. at 63-64, 90-91, 184-86, 209-10, 212-15). Hooper's other former responsibilities, including administrative duties (such as purchasing of plant supplies, handling employee records and time cards), were distributed to other existing employees. Like Tigg, these other employees also performed Hooper's former duties in addition to their own duties. (App. at 185).

available." (App. at 194, 206). Thus, as a result of the proposed reorganization of the salaried work force, the services of a number of salaried employees, including Hooper, would no longer be needed. (App. at 139, 188).

After making his proposal to Gettys, and pursuant to corporate policy, Pittard then evaluated employees for the remaining positions against stated criteria using standard Cargill evaluation grids. (App. at 109, 165-67, 195, 197-99, 206). Pittard completed the evaluation grids for the affected employees with respect to the positions that would exist after the reduction in force, keeping in mind the additional or increased job responsibilities and increased level of performance that would be expected. (App. at 109, 195, 197-99, 206). The objective of this process "was to have the best performers with the highest potential remaining following the reduction" in force. (App. at 172).

Including Hooper, a total of eight employees were separated from employment in the reduction in force that occurred in June 1996. (App. at 106). Five of the eight employees who were laid off were younger than Hooper. What's more, many employees who were *older* than Hooper were retained after the reduction in force. (App. at 61-62, 65-66, 72, 93, 133). In fact, 18 employees older than Hooper (ages 47 to 60)[8] remained employed after the reduction in force. (App. at 105-06, 110-14).

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8. W. Masters (**age 53**), T. Sibley (**age 48**), C. Allen (**age 54**), W. Butler (**age 50**), J.B. Dodson (**age 50**), E. Garret (**age 51**), J. Garret (**age 47**), H. Tate (**age 54**), W. Robertson (**age 47**), D. Howland (**age 48**), J. Humphrey (**age 49**), G. James (**age 55**), J. Johnson (**age 51**), W. Jones (**age 52**), J. Majors (**age 50**), L. Mangrum (**age 55**), G. Page (**age 47**), W. Parker (**age 60**). (App. at 105-06, 110-14).

REASONS FOR DENYING THE WRIT

A. The Decision of the Court of Appeals Regarding Hooper's Failure to Establish a *Prima Facie* Case is Fully in Accord with the Decisions of Other Circuit Courts of Appeal.

Hooper claims "the Sixth Circuit held that in a reduction in force proceeding unless the terminated employee is actually replaced by a retained younger employee plaintiff is unable to establish a *prima facie* case by showing his duties were assumed by younger, less qualified employees."[9] (Petition at 8). Hooper has mis-stated both the holding of the court below and the standard for establishing a *prima facie* case in the Sixth Circuit.

The opinion of the Sixth Circuit in the case *sub judice* stated succinctly that, "If his employer did not replace him, the plaintiff cannot state a *prima facie* case *without* presenting 'evidence sufficiently probative to allow a fact finder to believe that the employer intentionally discriminated against the plaintiff because of age'." (Petition at A-4) (emphasis added) (citing *Barnes v. GenCorp, Inc.*, 896 F.2d 1457, 1466 (6th Cir.), *cert. denied*, 498 U.S. 878, 111 S. Ct. 211, 112 L. Ed. 2d 171 (1990)). From this language, it is clear that a plaintiff in the Sixth Circuit can establish a *prima facie* case either by showing he was replaced by a substantially younger individual[10] or by presenting "evidence sufficiently

9. By this statement, Hooper implicates the fourth element of the *prima facie* case; the first three elements are not in dispute.

10. Replacement by a substantially younger individual is at least one method of creating an inference of age discrimination as held by this Court in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 313, 116 S. Ct. 1307, 134 L. Ed. 2d 433 (1996).

probative" of intentional age discrimination. Thus, Hooper's contention that a plaintiff must show that he was "actually replaced by a retained younger employee," (Petition at 8), is simply wrong.

Using his faulty assessment of the Sixth Circuit's standard as a basis for argument, Hooper cites opinions from the First, Second and Seventh Circuits in an attempt to support his contention that there is a split in the circuits regarding the standard for establishing a *prima facie* case in a reduction in force situation.[11] Of these three cases, one is distinguishable because it is not a reduction in force case,[12] and the other two cases reflect the same *prima facie* standard applied by the Sixth Circuit.

Hooper cites *Cronin v. Aetna* in his attempt to show a split in the circuits. The Second Circuit in *Cronin* stated that the fourth element of a *prima facie* case in a reduction in force situation is satisfied when a plaintiff can present evidence "that the discharge occurred under circumstances giving rise to an inference of age discrimination." *Cronin*,

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11. The cases cited by Hooper are *Miller v. Borden, Inc.*, 168 F.3d 308 (7th Cir. 1999); *Brennan v. GTE Gov't Sys. Corp.*, 150 F.3d 21 (1st Cir. 1998); *Cronin v. Aetna Life Ins. Co.*, 46 F.3d 196 (2nd Cir. 1995). (Petition at 8).

12. Hooper cites *Miller v. Borden* as a reduction in force case. However, the case in *Miller* involved only a single discharge and the *Miller* court itself very carefully distinguished it from "a RIF or 'reduction in force' " case. *See Miller*, 168 F.3d at 313 & n.1. The Sixth Circuit opinion in the case *sub judice* also points out that *Miller* does not apply in this situation: "*Miller* considers the burdens attending a case of a single discharge, not a reduction in force, and the opinion distinguishes reduction in force from single discharge cases." (*See* Petition at A-7 n.1).

46 F.3d at 204 (citations omitted). The Sixth Circuit in *Barnes* stated that the fourth element of the *prima facie* case can be made by showing that the person was "replaced,"[13] *or* by establishing "evidence sufficiently probative to allow a fact finder to believe that the employer intentionally discriminated against the plaintiff because of age." *Barnes*, 896 F.2d at 1466.[14] In both circuits, a plaintiff must present evidence that would allow a jury to believe that age discrimination occurred. Thus, despite the slight difference in semantics, it is clear that the standard required for the fourth element of the *prima facie* case is the same.

Finally, Hooper cites *Brennan v. GTE Government Systems Corp.* for the proposition that the First Circuit's *prima facie* requirements are also inconsistent with that of the Sixth Circuit. (Petition at 8). The *Brennan* court articulated the fourth element of a *prima facie* case in a RIF situation as the "employer did not treat age neutrally or younger persons were retained in the same position." *Brennan*, 150 F.3d at 26. Once again, the semantics vary from the Sixth Circuit, but the standard remains the same. That is, in a reduction in force case, a plaintiff must show some evidence that an inference of age discrimination could be drawn from the circumstances attending the plaintiff's discharge.

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13. "A person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work." *Barnes*, 896 F.2d at 1465.

14. The *Barnes* court provided a couple of examples stating that, "A plaintiff could establish a *prima facie* case by showing that he or she possessed qualifications superior to those of a younger co-worker working in the same position as plaintiff. . . . [Or a] plaintiff could show that the employer made statements indicative of a discriminatory motive." *Barnes*, 896 F.2d at 1466.

Hooper's attempt to create the illusion of a split in the circuits on this issue is akin to trying to substantively distinguish between "six" and "a half dozen" simply because the words are different. While it is true that various circuits word their *prima facie* case language differently, the primary focus is whether an inference of age discrimination can be drawn from the surrounding circumstances. In fact, the *McDonnell Douglas* analysis anticipates variation in the language. *See Burger v. New York Institute of Technology*, 94 F.3d 830, 834 (2d Cir. 1996) ("The *McDonnell Douglas* analysis is neither 'rigid' nor 'mechanized' and *the primary focus is always* whether an employer treats an employee less favorably than other employees for an impermissible reason.") (emphasis added). Thus, for all of the foregoing reasons, Hooper has not established that there is a split in the circuits regarding the elements of a *prima facie* case in a reduction in force situation. The Petition for Writ of Certiorari should be denied on this basis.

B. There is Also No Split in the Circuits Regarding the Types of Evidence That a Plaintiff May Use to Establish a *Prima Facie* Case.

Hooper's premise that the circuits are split regarding the consideration of various types of evidence during the *prima facie* analysis is also faulty. Specifically, Hooper focuses on statistical information, personnel policies applied inconsistently to persons of different ages, and age-biased statements. Where these criteria "allow a fact finder to believe that the employer intentionally discriminated against the plaintiff because of age," *Barnes*, 896 F.2d at 1466, they may be used as evidence in the Sixth Circuit or *any* circuit

to establish the fourth element of a *prima facie* case.[15] Simply because *Hooper's evidence* was insufficient to rise to the level of showing an inference of age discrimination does not mean there is a split in the circuits.

Hooper claims that "Defendant's failure to follow its own policies *permits* an inference of age discrimination." (Petition at 10).[16] Hooper further alleges that an employer's discredited reason for termination *can be* a basis for an inference of age discrimination (Petition at 11)[17], and that statistics *can be* considered along with other evidence for purposes of a *prima facie* case. (Petition at 11).[18] This is all true. It is also true in the Sixth Circuit.

Under the plain language of the *Barnes* opinion, this type of evidence may be considered by the Sixth Circuit in a plaintiff's attempt to establish *prima facie* evidence of age discrimination. However, the simple fact is that none of the evidence proffered by Hooper was sufficient under all the circumstances to find an inference of discrimination. Thus, Hooper's assertion that the Sixth Circuit does not allow consideration for this type of evidence is mis-stated.

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15. *See, e.g., Skalka v. Fernald Envtl. Restoration Management Corp.*, 178 F.3d 414, 420-22 (6th Cir. 1999); *Herold v. Hajoca Corp.*, 864 F.2d 317, 319-20 (4th Cir. 1988).

16. Citing *Gallo v. Prudential Residential Servs., Ltd.*, 22 F.3d 1219, 1227 (2d Cir. 1994) (emphasis added).

17. Citing *Brooks v. Monroe Systems for Business, Inc.*, 873 F.2d 202, 204 (8th Cir.), *cert. denied*, 493 U.S. 853, 110 S. Ct. 154, 107 L. Ed. 2d 112 (1989) (emphasis added).

18. Citing *EEOC v. NY Times Broadcasting Servs.*, 542 F.2d 356, 360 (6th Cir. 1976) (emphasis added).

Consequently, Hooper's contention that there is a split in the circuits on this issue is simply wrong and his Petition for Writ of Certiorari should be denied on this basis.

C. In Any Event, Summary Judgment Was Correctly Granted and Affirmed Without Regard to Any Alleged Split in the Circuits. -

Summary judgment is appropriate where there is no genuine issue as to any material fact.[19] In the case *sub judice*, both the District Court and the Sixth Circuit Court of Appeals determined that there was no genuine issue of any material fact, and that judgment as a matter of law in favor of Cargill was appropriate. (Petition at A-17, A-37).

In its decision, the Sixth Circuit opined that "[m]aterial facts are those which, under substantive law governing the issue, might effect the outcome of the suit. . . . Mere allegations of a factual dispute are not sufficient to meet this standard." (Petition at A-27).[20] As the Court noted: "Summary judgment is appropriate for the simple reason that there is absolutely no evidence linking the termination to Plaintiff's age." (Petition at A-32).[21] The Court correctly pointed out that: (1) Hooper offered no evidence that Tigg

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19. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-52, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

20. Citing *Anderson*, 477 U.S. at 247-48.

21. Citing *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66, 70 (6th Cir. 1982).

was not qualified for the new position or did not merit his good evaluations; (2) Hooper did not offer evidence showing that he did not deserve his lower evaluation under the higher expectations of the new management; and (3) Hooper has admitted that Cargill terminated employees who were under 40 and retained employees who were over 40 years of age. (Petition at A-33). In fact, the Sixth Circuit opinion provides an excellent discussion of why Hooper's basis for his allegations are either insufficient or unable to establish any genuine issue of material fact. (Petition at A-33 thru A-37).

In Part III of his Petition, Hooper merely states, without providing any specific examples, that the "district court and the panel assumed the jury's function by weighing the evidence and construing the evidence in favor of Defendant and ignoring evidence in support of Plaintiff on the issue of Plaintiff's *prima facie* case." (Petition at 13). In fact, Hooper failed to refute, or even address, any of the specific evidentiary deficiencies detailed by the Sixth Circuit. Thus, because Hooper has *merely asserted* that the District Court and the Sixth Circuit misapplied the summary judgment standards and has not provided a shred of supporting evidence or documentation for this assertion, this basis for granting his Petition for Writ of Certiorari should be denied.

Finally, even if it were assumed that Hooper had established a *prima facie* case, the economic reduction in force and Hooper's inferior skills[22] would satisfy Cargill's burden of articulating a legitimate, non-discriminatory reason for its actions. Applying the burden-shifting analysis set forth

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22. *See* App. at 191; Petition at A-34 (noting Hooper's inferior computer skills).

in *Texas Department of Community Affairs v. Burdine*,[23] the burden of persuasion would again shift to Hooper to demonstrate pretext. However, as noted by the Court of Appeals, Hooper has failed to offer evidence to support even an inference of age discrimination and, certainly, not enough to carry his ultimate burden.[24]

D. The Decision of the Sixth Circuit Court of Appeals is Consistent with the Prior Decisions of This Court.

The Sixth Circuit Court of Appeals below adhered to the sound principles and well-established precedents set by this Court in *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) (establishing the burden shifting framework for employment discrimination cases), *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993) (finding that the termination of an employee for some feature other than age is not violative of the ADEA, even if the feature in question is a corollary to the employee's age (e.g., salary, pension, seniority)), and *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 116 S. Ct. 1307, 134 L. Ed. 2d 433 (1996) (finding that replacement by a person outside the protected class is not a proper element of the *prima facie* case in an ADEA case). Assuming *arguendo* that there is some variation among the circuits concerning the ADEA *prima facie* elements, resolution of such a variation pursuant to the well-established principles and precedents of this Court would not benefit Hooper. Therefore, Hooper's Petition for Writ of Certiorari should be denied.

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23. 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

24. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993).

CONCLUSION

This case does not merit further review by the Supreme Court. For all of the foregoing reasons, Cargill respectfully requests that this Court deny Hooper's Petition for Writ of Certiorari.

Respectfully submitted,

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